

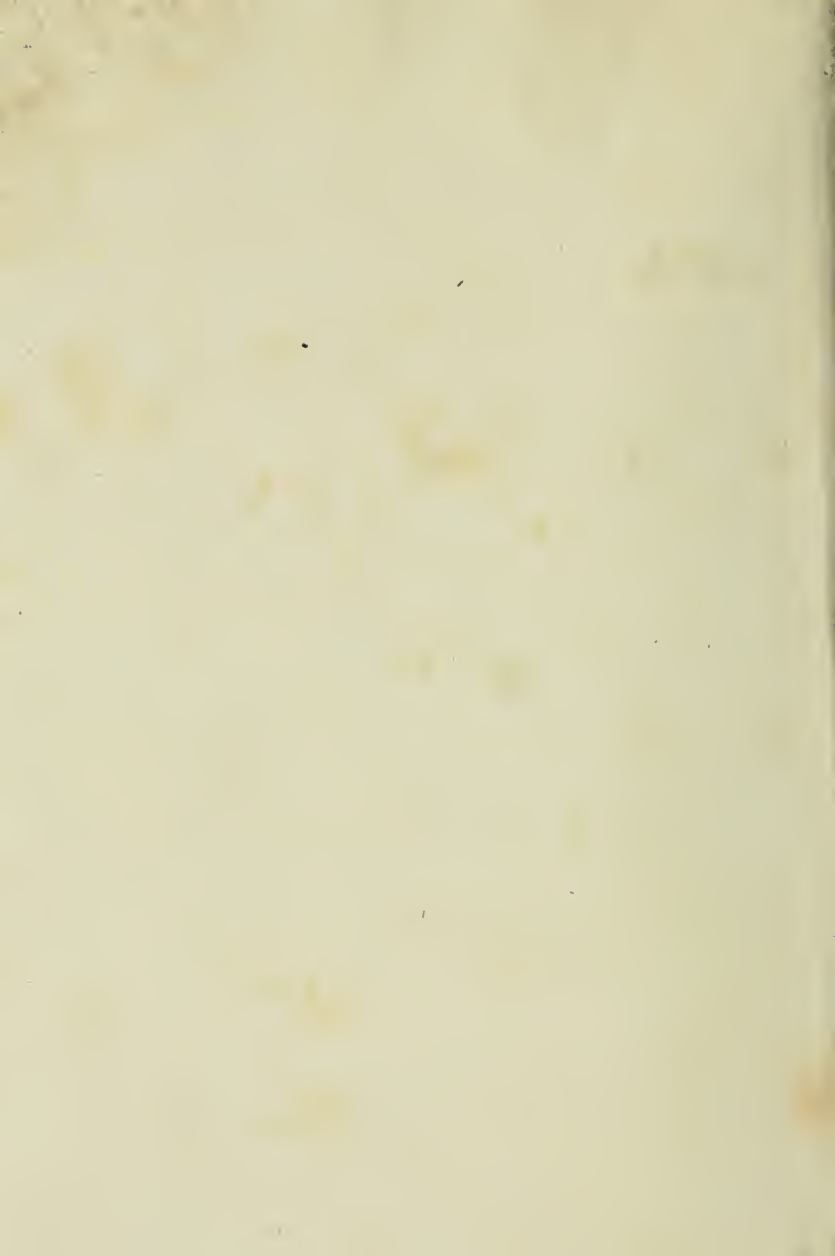
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A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

By WILLIAM CRUISE,
OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE SIXTH.

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C O N T E N T S

OF THE

SIXTH VOLUME.

TITLE XXXVIII.

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CORRECTIONS AND ADDITIONS.

Vol. I.—page 92. l. 19 for *no* read *a*.—l. 26 for *his* read *the*; and after Administrators, insert, *of the Party that had the Estate.*

pa. 93. l. 13. after *convey* read *jointly with such Person.*

pa. 221. l. 22. for *interred* read *interest.*

pa. 284.—§ 5. No notice is necessary to a tenant at sufferance.

pa. 301. § 32. The doctrine here laid down must be understood, that an attachment will lie against the lord, if he should refuse inspection, after a rule of court directing it.—Vide the King v. Shelley, 3 Term Rep. 141.

pa. 355. l. 16. for *deprivation* read *depreciation.*

pa. 405. l. 20. dele *not.*

pa. 414. l. 2. for *eldest* read *youngest.*

pa. 455. l. 14. for *G* read *D.*

pa. 461. l. 20. after *heirs*, insert, *in trust for B.*

pa. 512. l. 27. for *devised* read *demised.*

pa. 514. l. 21. for *lessee* read *lessor.*

pa. 534.—§ 30. The determination of the Master of the Rolls, that a term attendant on the inheritance will not protect a purchaser from dower, unless it has been actually assigned to a trustee, for the purchaser has been confirmed by Lord Eldon.—Vide 10 Ves. Jun. 269.

Vol. II.—page 28. l. 18. after *could* insert *not*.

pa. 109. l. 30. for *mortgagors* read *mortgagees*.

pa. 124. l. 19. for *vote for knight of the shire* read *fit in Parliament*.

pa. 130. l. 15. for *mortgage* read *mortgagee*.

pa. 217. l. 25. for *assignment* read *appointment*.

pa. 219. l. 3. dele *now the*.—l. 4. add, by Lord Hardwicke.

pa. 235. last line, for *incumbrancer* read *incumbrance*.

pa. 284. l. 11. for *to* read *by*.

pa. 403. l. 8. after *againſt*, insert—the representatives of.

pa. 410. l. 17. for *a* read *A. the*.—l. 19. for *in* read *is*.

pa. 427. l. 29. for 41. read 21.

pa. 455. l. 24. dele case.

pa. 505. l. 20. for *to* read *by*.

Vol. III.—pa. 36. In Marg. for *b*. read 6.

pa. 236. l. 6. dele *or Felony*.

pa. 271. l. 24. dele *that*.

pa. 394. l. 18. after *them*, insert—his grandfather's brothers or sisters, or their descendants, or for want of them—

Vol. IV.—pa. 158. l. 9. dele *in*.

pa. 240. § 32. in a subsequent case, Lord Eldon held clearly that a person may have a power of appointment, at the same time taking to himself the whole interest in the fee over which the power is to be executed, 10 Ves. jun. 254.

pa. 281. § 64. vide 10 Ves. jun. 266.

pa. 461. l. 15. for *without* read *with*.

A
DIGEST
OF THE
Laws of England
RESPECTING
REAL PROPERTY.

TITLE XXXVIII.

D E V I S E.

CHAP. I.

Of the Origin and Nature of Devises.

CHAP. II.

Who may devise, and to whom.

CHAP. III.

What may be devised.

CHAP. IV.

Of Devises of Copyholds.

CHAP. V.

Of the Solemnities necessary to a Devise.

CHAP. VI.

Of the Revocation of Devises.

CHAP. VII.

Of the Republication of Devises.

CHAP. VIII.

Of void Devises.

CHAP. IX.

Of the Construction of Devises.—General Rules.

CHAP. X.

Construction.—What Words create a Devise, and describe the Devisees, and the Things devised.

CHAP. XI.

Construction.—What Words create an Estate in Fee.

CHAP. XII.

Construction.—What Words create an Estate Tail.

CHAP. XIII.

Construction.—What Words create an Estate for Life.

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CHAP. XVII.

Executory Devises.—Devise over after a Devise in Fee-Simple.

CHAP. XVIII.

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CHAP. XIX.

Executory Devises of Terms for Years.

CHAP. XX.

Other Matters relating to Executory Devises.

CHAP. I.

Of the Origin and Nature of Devises.

- | | |
|--|---|
| <p>§ 1. <i>Origin of Devises.</i>
 6. <i>Statutes of Wills.</i>
 10. <i>Nature of a Devise under these Statutes.</i>
 12. <i>Of a Codicil.</i>
 14. <i>A Devise transfers the Freehold.</i>
 15. <i>And imports a Consideration.</i></p> | <p>16. <i>Devises are void against Creditors.</i>
 18. <i>Devises are entitled to Aid in Equity.</i>
 19. <i>A Devise need not be proved in the Ecclesiastical Court.</i>
 21. <i>A Devise may be registered.</i></p> |
|--|---|

Section 1.

THE last mode of conveying property, is, by devise or disposition contained in a person's last will and testament, to take place at the death of the

Origin of
Devises.

devisor.

Howard
Cout. Angl.
Norm. vol. 1.
p. 476.

Lib. 7. c. 5.

devisor. The word *devise* appears to be derived from divide, and, originally, meant any kind of division or distribution of lands; but it was used to denote a will so early as in the time of *Glanville*, who says,—*Potest enim quilibet homo, majoribus debitis non involutus, de rebus suis, in infirmitate sua, rationabilem devisam facere.*

1 Inst. 111 b.
n. 1.

2 Inst. 7.
6 Rep. 17 a.
Gilb. Rep.
259.

Wright's
Ten. 173.

§ 2. It is generally agreed, that the power of devising lands existed in the time of the *Saxons*; but, upon the establishment of the *Normans*, it was taken away, because it was inconsistent with the principles of the feudal law; and, although many of the restraints on alienation by deed were removed before *Glanville* wrote, yet the power of devising lands was not allowed for a long time after, partly from an apprehension of imposition on persons in their last moments, and partly on account of the want of that public notoriety which the common law required in every transfer of real property: and, therefore, it is said in the same chapter of *Glanville*, from which the passage in the preceding section is taken, which relates to personal property only, that no person could dispose of his lands by will; *de hereditate vero nihil in ultima voluntate disponere potest.*

Rob. Gav.
334.

§ 3. The power of devising, however, continued as to socage lands situated in cities and boroughs, and also as to all lands in *Kent*, which were held by the custom of *Gavelkind*; and as the ancient *Saxon* laws are supposed to have remained unaltered in *Kent*, this

is

is an additional proof, that lands were devisable in the time of the Saxons.

§ 4. We have seen, that a power of devising lands was indirectly acquired by means of the invention of uses; and this power appears not only to have been allowed by the Crown and the Legislature, but even, in some particular instances, to have received their sanction: for, by the statute 7 *Hen.* 7. c. 3. and 14 and 15 *Hen.* 8. c. 14. persons who were in the king's service in the wars, were allowed to alien their lands, for the performance of their wilis, without licence or fine for alienation. Tit. 11. ch. 2. f. 34.

§ 5. The practice of devising the use of lands, carried the power of disposing of real property much farther than was consistent with the nature of tenures: it tended to deprive lords of their wardships, profits of marriages and reliefs, and the king of his primer seisin, livery and fines for alienation; which constituted a considerable part of the old revenue of the crown. This, together with many other inconveniencies, that flowed from the doctrine of uses, was removed by the statute 27 *Hen.* 8. c. 10. which, uniting the legal seisin of the land to the use, effectually took away the power of devising. Tit. 11. ch. 3.

§ 6. The inconveniencies which attended this restraint on the disposition of lands by devise, induced the Legislature, in a few years after, to give every one a power of devising a certain portion of his land. An act was therefore made, 32 *Hen.* 8. c. 1. intituled, Statutes of Wills,

Title XXXVIII. *Devise.* Ch. i. § 6, 7.

The act of wills, wards, and primer seifins, &c. reciting, that persons of landed property could not conveniently maintain hospitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and moveables; it, therefore, enacts, that all and every person and persons having manors, lands, tenements, or hereditaments, may give and dispose of them, as well by last will and testament in writing, as by any act executed in their lifetime, in the following manner: If they held in soccage, they might devise the whole; and if they held of the king, or of any other person by knight service, they might devise two parts, or as much as should amount to the yearly value of two parts in three, in certainty, and by special divisions, so as it might be known,

§ 7. By the statute 34 and 35 Hen. 8. c. 5. intituled, *An act for the explanation of wills*, reciting, that several doubts, questions, and ambiguities, had arisen upon the statute 32 Hen. 8. it was enacted, that the words “estate of inheritance,” used in that statute, should mean only an estate in fee-simple. And that “all and singular person and persons, having
 “a sole estate or interest in fee-simple, or seised in fee-
 “simple in coparcenary or in common of or in any
 “manors, lands, tenements, rents, or other heredi-
 “taments in possession, reversion, remainder, or of
 “rents or services incident to any reversion or re-
 “mainder (not holding by knight’s service), shall have
 “full and free liberty, power, or authority, to give,
 “dispose, will, or devise to any person or persons
 “(except

“ (except bodies politic and corporate) by his last will
 “ and testament in writing, as much as in him of
 “ right is or shall be, all his said manors, lands,
 “ tenements, rents, and hereditaments, or any of
 “ them.”

§ 8. With respect to lands held by knight-service, either of the king or of a subject, no more than two-thirds thereof could be devised under the authority of these statutes; but, in consequence of the abolition of military tenures, and the conversion of knight-service into common socage, the operation of these statutes now extends to all estates in fee-simple.

§ 9. The statutes of wills, being in the affirmative, were held not to take away the custom of devising; and, formerly, it was of importance, in many cases, to resort to the custom of devising, as being most beneficial for the devisee: but now, the two powers being assimilated, and made for the most part commensurate, it can seldom happen that it should be necessary to call the power by custom in aid; though it is possible, as, where the custom enables an infant of fourteen, or a feme covert, to devise.

1 Inst. 111 b.
 n. 4.
 3 Rep. 35 a.

§ 10. The idea of a devise of land was, evidently, taken from the testament of the *Romans*, which was at all times allowed in *England* with respect to personal property. But the power of devising lands, being given by positive statutes, is only co-extensive with the words of these statutes: a devise is, therefore, founded on different principles, and governed by different rules,

Nature of a
 Devise under
 these Sta-
 tutes.

Cowp. Rep.
305.

from a testament, which is only an instrument to convey personal property ; for a devise is considered, not so much in the nature of a testament, as of a conveyance declaring the uses, to which the land shall be subject after the death of the devisor.

§ 11. The word *testament*, in the *Roman* law, was applied only to dispositions, which contained the institution or appointment of an heir, who was to take all the property of the testator ; and the *Roman* lawyers observe, that a testament might be made in five words, *Quinque verbis potest quis facere testamentum, ut dicat, " Lucius Titius mihi hæres esto."* All other dispositions, in which there was no heir named, were called *codicils*, or donations in contemplation of death ; but the *English* law does not admit of these distinctions : for a devise does not necessarily imply the appointment of a general heir, or a disposition of all the testator's lands, but only of those which are particularly mentioned, and the residue descends to the heir of the testator, as if no such devise had been made.

Of a Codicil.

§ 12. A codicil, of which the name only is taken from the *Roman* law, is a supplement to a devise, or an addition made by a testator to his will, and of which, it is considered as a part ; being intended to alter or explain, or to make some addition to, or subtraction from, the former dispositions of the testator,

§ 13. A person may, therefore, make several wills of different parts of his lands, or of distinct estates or interests therein ; and he may also make several codicils,

dicils, altering, explaining, adding to, or subtracting from, what has been before devised; or devising any part of his estate not disposed of by any former will or codicil; and the law will annex such codicil or codicils to his will, and consider the whole as one instrument.

§ 14. In the case of a devise of lands, the freehold is in the devisee before entry, and he may enter without the assent of the heir of the devisor, to whom nothing descends. If the heir of the devisor enters, the devisee may bring an ejectment against him: and those to whom lands are given by devise, are said to take in the nature of purchasers, though the bounty of the testator is the only consideration which is supposed in a will,

A Devise transfers the Freehold.
1 Inst. 111 d.

§ 15. A devise imports a consideration in itself, and, therefore, cannot be averred to be to the use of any other but the devisee. It is for this reason, that a devise of lands cannot be averred at law to be in bar of dower, jointure, or any other right or interest to which the devisee is entitled. But, in equity, a devise is sometimes considered as a satisfaction.

And imports a Consideration.
Tit. 6. ch. 5.
s. 22, &c.

§ 16. Soon after the statute of wills, it was found, that the power of devising was attended with some very material inconveniencies; for creditors by bond or other specialty, which affected the heir, provided he had assets by descent, were defrauded of their securities, not having the same remedy against the devisee of their debtor. But it has been stated in a former title

Devises are void against Creditors.

Tit. 32. c. 10.
f. 15.

Kinafton v.
Clarke,
Tit. 17. f. 26.

title, that, by the statute 3 *William and Mary*, c. 14. f. 2. and 3. all devises of land are declared to be fraudulent and void, as against bond-creditors, who may sue the heirs of the obligor, and also his devisees, jointly. And it has been determined by Lord *Hardwicke*, that an estate in reversion is within this statute; and that a devise of the reversion by the heir of the obligor is also within the act; and, in such a case, the lands are liable.

§ 17. By the 4th section of this statute, devises for payment of debts or children's portions, pursuant to a marriage agreement, are excepted.

Devises are
entitled to
aid in Equity.

Duchefs of
Newcastle v.
Pelham,
3 Bro Parl.
Ca. 460.

§ 18. Persons who claim lands under a will, having the law on their side, are entitled, as against the heir of the devisor, to the assistance of a court of equity, for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up as following the lands. And this course of proceeding is founded on the highest reason; for, otherwise, all wills of land might be disappointed, and the heir at law, by gaining possession and getting the deeds into his custody, unless compellable to discover and produce them, in order to make out the title of the devisee, might defend himself at law, by setting up prior incumbrances, and by that means prevent a legal trial of the validity of the will, and totally frustrate the intention of the testator.

A Devise
need not be
proved in the
Ecclesiastical
Court.

§ 19. A will of lands need not be proved in the ecclesiastical court, although it is usually done; because
most

most wills of land contain also a disposition of personal estate. For the probate of such a will cannot be given in evidence, all the proceedings, so far as they relate to lands, being *coram non judice*, as that court has no power to authenticate such a devise; and, therefore, a copy produced under its seal, is not evidence.

Cro. Car.
296—346.

§ 20. It is, therefore, frequently necessary, to produce the original will, and, for that purpose, to take it out of the ecclesiastical court in which it has been proved. And, in such a case, an application must be made to the Court of Chancery for an order to deliver the will.

1 Atk. 627.
4 Bro.R. 476.

§ 21. A memorial of a will may be registered. Where it relates to lands situated in *Middlesex*, or in any of the ridings of *Yorkshire*, in which there is a register.

A Devise
may be re-
gistered.
Tit. 32. c. 21.

TITLE XXXVIII,

DEVISE.

CHAP. II.

Who may devise, and to whom,

- | | |
|--|--|
| <p>§ 2. <i>Who may devise.</i>
 3. <i>The King.</i>
 5. <i>The Queen.</i>
 6. <i>Who are disabled from devising.</i>
 7. <i>Infants.</i>
 9. <i>Idiots and Persons of nonsane Memory.</i>
 10. <i>Married Women.</i></p> | <p>12. <i>Removal of Disabilities does not establish a Will.</i>
 16. <i>Who may be Devisees.</i>
 17. <i>Infants in Ventre Matris.</i>
 19. <i>Married Women.</i>
 20. <i>Aliens.</i>
 21. <i>Bastards.</i>
 22. <i>Persons uncertain.</i>
 23. <i>Bodies Politic cannot be Devisees.</i></p> |
|--|--|

Section 1.

TO the validity of every devise it is essentially necessary that there be a devisor capable of disposing, and a devisee or devisees capable of taking the lands devised.

Who may
devise.

§ 2. With respect to the persons who are capable of devising, all persons seized in fee simple and who are capable of disposing of their estates by any conveyance, *inter vivos*, may dispose of them by will.

The King.
Rot. Parl.
Vol. 3. 301.
Nº 10.
4 Inst. 335.

§ 3. In 16 *Rich. 2.* the bishops, lords, and commons, assented in full parliament, that the king his heirs and successors might lawfully make their testa-

ments; and that execution might be done of the same, whereof some doubt was made before. This act only authorized our kings to dispose of their personal property. For it is stated in *Brook's Abridgment* to have been laid down by *Fortescue* in 35 *Hen. 6.* that the king could not devise his land by his testament. But it appears from the rolls of parliament, that our kings were in the practice of conveying lands to trustees to the use of their last wills.

Tit. Prerog.
pl. 5.

§ 4. It has however been lately enacted, that his Majesty, his heirs and successors, may by his will devise any manors, messuages, lands, tenements, and hereditaments, which have at any time been purchased by his Majesty, or shall at any time be purchased by him, his heirs or successors, out of any monies issued and applied for the use of his or their privy purse, or with any other monies not appropriated to any public service, or to any manors, &c. which have come to his Majesty, or shall come to him, his heirs or successors, by gift, devise, or descent, or otherwise, from any of his or their ancestors, or any other person or persons, not being kings or queens of this realm.

39 & 40 Geo.
3. c. 33. s. 4.

§ 5. The same statute, § 8. after reciting that by the law of *England* the queen consort, wife of the king, was capable of taking, granting, or disposing of property, as if she were a feme sole, but that doubts might arise how far this capacity of granting or disposing of property extended, and especially whether during the life of the king her husband, it included the power of devising and bequeathing by last will and testament,

The Queen.

testament, and reciting that his Majesty was desirous that her Majesty during the King's life should have full power by her last will and testament to dispose of her real estates; it was enacted that it should be lawful for her Majesty, during the joint-lives of their Majesties, by her last will and testament to dispose of any manors, messuages, lands, tenements, and hereditaments, purchased by or in trust for her Majesty, or which should thereafter vest in her Majesty, or in any person in trust for her, as fully as if she were sole and unmarried.

Who are disabled from devising,
f. 14.

§ 6. With respect to the persons who are disabled from devising lands, there are four personal disqualifications mentioned in the statute of wills.

Infants.

§ 7. The first of these is infancy, and therefore persons under the age of twenty-one years are incapable of devising their lands. But if there be a local custom that lands and tenements within a certain district shall be devisable by all persons of the age of fifteen years or upwards, a devise of such lands by an infant of fifteen will be good.

Perk. f. 504.

Bedell v.
Constable,
Vaugh. 177.

§ 8. An infant may devise the guardianship of his child, by virtue of the statute 12 Cha. 2. ch. 24. And it has been contended that such a disposition draws after it the land, as incident to the guardianship; but this point has not been determined.

Idiots and
Persons of
nonsane Me-
mory.

§ 9. Another disability expressly mentioned in the statute of wills is idiocy, and nonsane memory. But
it

it should be observed that every person making a will is presumed to be of sound understanding until the contrary be proved, so that the *onus probandi* lies on the other side.

§ 10. Married women are also expressly disabled by the statute of wills, from devising their lands. But married women are now frequently enabled to dispose of lands by wills operating as appointments under powers.

Married
Women.

Tit. 32.
ch. 15. f. 26.

§ 11. A woman whose husband has abjured the realm, or who has been banished for life by act of parliament, may in all things act as a feme sole; and may therefore make a will of her lands.

1 Inst. 133 a.
Portland v.
Prodger,
2 Vern. 104.

§ 12. Where a devisor is under any of the disabilities before mentioned at the time when the will is made, it is absolutely void although the disability be removed before the death of the devisor; for the parties must be capable of devising at the time when they make their will.

Removal of
Disabilities
does not esta-
blish a Will.

§ 13. A man of full age declared in the presence of several witnesses that his will, made when he was under age, should stand. It was however adjudged that the will was void, on account of the infancy of the devisor, at the time of the first publication. But if the will had been republished after the devisor had attained his full age, it would have been good.

Hawe v.
Burton,
Comb. 84.

1 Salk. 238.

§ 14. If

11 Mod. 157. § 14. If a person be of nonsane memory at the time of making his will, though he should afterwards recover his understanding; yet the will continues void:

Idem. § 15. It is the same if a married woman makes a will, and afterwards becomes a widow; for the will was void in its inception.

Who may be
Devisees. § 16. All natural persons who are in *esse* at the time when a will is made, and who are capable of acquiring lands by purchase, such as infants, &c. may be devisees.

Infants in
Ventre Ma-
tris. § 17. It was formerly much doubted whether an infant in *ventre matris* could be a devisee in a will, but it is now settled that a devise of this kind is good.

Doe v.
Clarke,
2 Hen. Black.
Rep. 399. § 18. A person devised to his brother *Henry Clarke* and his assigns for life, remainder to the use and behoof of all and every such child or children of his said brother as should be living at the time of his decease. *Henry Clarke* died leaving several children, and his wife pregnant, who was delivered seven months after of a daughter. The question was, whether the posthumous child took any thing under this devise. Lord Chief Justice *Eyre* said, it was plain on the words of the will, that the testator meant that all the children whom his brother should leave behind him should be benefited. But independent of this intention, he held that an infant in *ventre sa mere*, who by the course and order of nature was then living, came clearly within the description of children living at the time

time of his decease, and judgement was given accordingly.

§ 19. A married woman is not thereby disabled from being a devisee in a will; and although she cannot take any thing from her husband by deed, yet neither the custom of devising, nor the statute of wills disqualify a wife from being the devisee of her husband; because the devise does not take effect until the death of the husband, by which the marriage is dissolved, and they cease to be one person.

Married
Women.

Lit. f. 168.
1 Inst. 112 a.

§ 20. Lord *Hardwicke* has said there is no rule of law, or upon the statute of wills, to prevent an alien from taking by devise, although it is a doubtful matter, for whose benefit he is enabled to take.

Aliens,
2 Vef. 362.

§ 21. A bastard may be a devisee, but he must have gained a name by reputation, and therefore a devise to a bastard *in ventre matris* is void, for he cannot gain a name by reputation until he is born.

Bastards.
1 Inst. 3 b.
1 P. Wms.
529.

§ 22. A devise to a person uncertain, as to such of *A.*'s daughters as shall marry a person of the name of *Norton* is good. And a devise to a person not in existence when the will is made, as to the first son of *A. B.* who has then no son, is good by way of remainder or executory devise.

Persons un-
certain.
Bate v.
Norton,
T. Raym. 82.

§ 23. Bodies politick and corporate are expressly disabled by the statute 34 and 35. *Hen.* 8. c. 5. f. 14. from taking by devise; in conformity to the spirit of

Bodies Politic
cannot be
Devisees.

Tit. 32. ch. 2.
s. 32.

the laws against mortmain. It was however held, in consequence of the statute 43 *Eliz.* c. 4. that a devise to a corporation for a charitable use, was valid, as operating in the nature of an appointment. But now the statute 9 *Geo.* 2. c. 36. has rendered all devises for charitable uses void, except such as shall be made to the two universities, and to the colleges of *Eton*, *Winchester*, and *Westminster*.

TITLE XXXVIII.

D E V I S E.

CHAP. III.

What may be devised.

- | | |
|--|---|
| § 1. <i>Estates in Fee-Simple.</i>
4. <i>Estates for Lives.</i>
5. <i>Chattels Real.</i>
6. <i>Trust Estates.</i>
7. <i>Equities of Redemption.</i>
8. <i>Mortgages.</i>
9. <i>Advowsons.</i>
11. <i>Rents.</i>
13. <i>Tithes.</i>
14. <i>Franchises.</i>
16. <i>An Authority.</i> | § 17. <i>Contingent Estates and Interests.</i>
22. <i>A Joint-Tenancy not devisable.</i>
25. <i>The Testator must be seized.</i>
28. <i>And must continue seized.</i>
29. <i>Exceptions.</i>
32. <i>Lands contracted for are devisable.</i>
39. <i>And Terms for Years acquired after the Will.</i> |
|--|---|

Section 1.

THE proper subject of a devise is real property ; Estates in Fee-simple,
 and the words used in the statute of wills are,
 “ manors, lands, tenements, rents, or other heredi-
 “ taments in possession, reversion, or remainder ;”
 which extend to every species of real property, whether
 corporeal or incorporeal.

§ 2. Not only estates in fee-simple absolute, but also 3 Bullst. 184.
 determinable fees, and base fees are devisable under
 these statutes ; the word fee-simple being taken in its
 most extensive sense.

§ 3. By the words of the statute 34 and 35 *Hen. 8.* all persons seised in fee-simple in coparcenary or in common, may devise the estates which they hold in this manner. And persons seised in fee may devise any rents, commons, or other profits out of, or to be perceived of the same, or out of any parcel thereof.

Estates for
Lives.
Gawin v.
Ramtes,
Cro. Eliz 804.

§ 4. The statute 34 and 35 *Hen. 8.* only extended to estates in fee-simple, and, therefore, did not enable persons to devise estates *pur auter vie*. But it was enacted by the statute 29 *Cha. 2. c. 3. s. 12.* that any estate *pur auter vie* shall be devisable.

Chattels Real.

§ 5. As to chattels real, or terms for years, they might always have been disposed of by testament, because they were only considered as personal estate. And in the case of a devise of a term for years, the devisee may maintain an ejectment; but he must shew the assent of the executor.

Young v.
Holmes.
1 Stra. 70.

Trust Estates.

2 P. Wms.
258.

§ 6. As uses were the medium through which lands were originally devisable, so trust estates, which in fact are uses not executed by the statute, are now devisable in the same manner as trust estates. But, where a person has only an equitable interest in lands, his devise of them amounts to no more than a direction to those who have the legal estate in trust for him, to convey it according to the devise.

Equities of
Redemption.
Philips v.
Hele, 1 Cha.
Rep. 190.

§ 7. An equity of redemption, being similar to a trust estate, is devisable; so that, where a person seised in fee mortgaged his estate, and afterwards devised it,
the

the court decreed that the equity of redemption belonged to the devisee, and not to the heir. But if a mortgagor devises the land before the condition broken, it will be void, because a condition is not devisable.

Anon. 2 Cha. Ca. 8.

§ 8. Lands in mortgage may also be devised by the mortgagee; and in such a case if the devisee exhibits his bill against the mortgagor for redemption or to be foreclosed, a decree will be made accordingly,

Mortgages.
How v. Vigu-
eres, 1 Cha.
Rep. 18.

§ 9. An advowson in gross being an hereditament is devisable under the statute of wills, and the next or any number of presentations may also be devised, in which case the devisee may either present himself or any other person.

Advowsons.
Cleer v.
Peacock,
Cro. Eliz.
359.
Law v. Epif.
Lincoln,
2 Black. Rep.
1240.

§ 10. Where the incumbent of a church had the inheritance of the advowson in him and devised the next presentation, it was held good; for though the will had no effect until the death of the devisor, yet it had an inception in his lifetime, and that made it good.

Penchin v.
Harri,
Cro. Ja. 371.

Hill v. Epif.
London,
1 Atk. 618.

§ 11. A rent charge is devisable by the words of the statute 34 and 35 Hen. 8. and a rent charge *de novo* may also be created by devise. But it was formerly doubted whether a rent charge *in esse*, issuing out of gavelkind lands, and having commenced within time of memory, was within the custom of devising; and it was not settled to be so till the time of Lord Hale.

Rents,

1 Inst. 111 a.
n. 5.

Idem.

§ 12. As to rent service, it of course followed the nature of the reversion or seignory to which it was incident. Nor was there any doubt as to the custom's extending to other rents if they had existed immemorially.

Tithes.

Tit. 22. f. 75.

§ 13. Tithes impropriate in lay hands are comprehended under the general word hereditaments in the statute of wills, and are therefore devisable.

Franchises.

1 Inst. 111 b.

3 Rep. 32 b.

§ 14. Lord *Coke* says, that franchises which are not of an annual yearly value cannot be devised; and therefore if the King grants *bona et catalla felonum*, waifs, estrays, or any other kind of franchise which is not of an annual value, it is not devisable. But franchises of a certain value, and not restrained to the person of the grantee and his heirs may be devised,

3 Rep. 32 b.

§ 15. Franchises, though not of an annual value, will however pass by devise as appurtenant to other things of an annual value. Thus, in *Butler* and *Baker's* case it is said, if a man be seised of a manor to which a court leet, waif, estray, or any other hereditament which is not of any annual value, is appendant or appurtenant, devises the manor with the appurtenances, these shall pass as incidents to the manor.

An Authority.

1 Inst. 113 a.

n. 2.

§ 16. An authority over lands and tenements may be given by devise to a stranger; and an authority to sell

sell lands has frequently been given by devise, and has been held to be within the statute of wills.

§ 17. Contingent remainders, and all other contingent estates and interests in lands are now held to be devisable, though formerly an opinion prevailed that they did not pass by a will made previous to their vesting.

Contingent
Estates and
Interests.

Fearne Con.
Rem. 537.

§ 18. *John Selwin* being tenant for life, with remainder to his son *John* in tail; the father and son joined in a deed of bargain and sale, dated 25th April 1751, to make a tenant to the *præcipe* for the purpose of suffering a common recovery, the uses of which were declared to be to the father for life, remainder to the son in fee. *Trinity* term began that year on the 7th of *June*; on the 8th *John* the son made his will, whereby he disposed of all his real estates. In the same term, a writ of entry was sued out, returnable *quinden. Trin.* which was the 17th of *June*; and the recovery was completed the same term. *John Selwin*, the testator, died soon after the return of the writ of entry: and the question was, whether the lands comprised in the recovery passed by the will, it having been made before the return day of the writ of entry? It was contended, that the testator had only a *future* executory use, at the time of making his will, not a present use; for the statute could not draw the estate to the use, until the possibility—that is, the completion of the recovery—had actually happened; and that this future executory use was not devisable.

Selwin v.
Selwin,
1 Black. R.
222. 251.
2 Burr. 1131.

1 Bla. Rep.
606.

The Court of King's Bench certified their opinion to the Court of Chancery, that the lands passed by the will. And Lord *Mansfield*, in a subsequent case, is reported to have said that, if the practice of the court allowed him to give his reasons, he was prepared to have shewn, with the concurrence of his brethren, that all contingent, springing, and executory uses, where the person who was to take was certain, so that the same might be descendible, were devisable.

§ 19. The doctrine, laid down by Lord *Mansfield* has been fully confirmed in the two following cases.

Moor v.
Hawkins
cited, 1 H.
Black. R. 33.
3 Term Rep.
88.

Sir *James Grubb* devised all his real estates in trust for his son *James*; and, if he should die without issue under age, then that all his estates should go to *Cochran*, his heirs and assigns. *Cochran* devised all the estates, whereof he was seised in possession, remainder, or reversion to the plaintiff, and died in the lifetime of *James Grubb* the son, who afterwards died under age, and without issue.

Ante §. 18.

On a bill brought by the devisee of *Cochran*, a question was made, whether the possibility given to *Cochran* was devisable? Lord Chancellor *Northington* said, “I
“ have never had any doubts since I was twenty-five
“ years old, but that these contingent interests were
“ devisable, notwithstanding some old authorities to
“ the contrary. I sent the question, however, into
“ the King's Bench in the case of *Selwin* and *Selwin*,
“ for the satisfaction of the parties; and the certi-
“ ficate

“ ficate of the judges in that case implies, I think,
“ that they agreed with me in this opinion.”

§20. A testator devised his dwelling house, &c. to his brother *T. L.* until his *T. L.*'s youngest son *J.* or any other of his younger sons should attain the age of twenty-one years; and, in case he should have no younger son who should attain that age, but only one son that should attain it, then until such only son should attain that age. And when his said nephew *J.* or any other of the younger sons of the said *T. L.* should attain the age of twenty-one years, then he gave his said dwelling house, &c. unto his said nephew *J.* or unto such other son as for the time being as should be a younger son of his said brother *T. L.* and should first attain his age of twenty-one years, and to the heirs and assigns of such younger son for ever. The testator left his said brother his heir at law, and *T.* and the said *J.* the sons (and only issue) of his said brother. *J.* died under twenty-one years of age; and afterwards *T.* in the lifetime of his father *T. L.* devised “ all his
“ worldly estate of what nature or kind soever, whether in possession, remainder, or reversion, that he
“ should die seised or possessed of, interested in, or intitled to, invested in, or should belong to him at
“ his decease, wheresoever or howsoever, in any
“ manner or wise,” unto his wife in fee. Upon this case three questions arose; first, whether there was a vested interest in *T.*? Secondly, whether, if it was contingent, it was devisable? And thirdly, whether it passed by the will?

Roe v. Jones
1 H. Black.
R. 30.

Lord *Loughborough* said, the discussion of the first question was necessary ; for, taking it to be a springing contingent executory use in *T.*, they were all of opinion that it was devisable, and passed by his will. And he observed upon the case of *Moor v. Hawkins* above cited, that it was a liberal and right determination, and judgment was given accordingly.

3 Term R.
88.

§ 21. Upon a writ of error into the Court of King's Bench, that court confirmed the decision of the Common Pleas ; and Lord *Kenyon* observed, that the statute, for enabling persons " having " any manors, lands, &c. to devise, must mean, " having an interest " in the lands." And he distinguished between such a contingent interest and a *mere possibility*, like that which an heir has from his ancestor ; which was nothing more than the *hope* of a succession, and was not subject to disposition ; and his Lordship hoped the point would be considered to be fully at rest. *Asburst*, J. said, the plain meaning of the statute was, that every person who had a valuable interest in lands, should have the power of disposing of it by will.---*Buller* J. observed, that, if it were such an interest as was *descendible*, it seemed strange to say it was not also *devisable* ; that they must both be governed by the same principle ; and that it was a sound distinction which had been taken by the Chief Justice, between a *bare possibility* and a *possibility accompanied with an interest*. And *Grose*, J. remarked, that the fourth section of the 34 and 35 *Hen. 8. c. 5.*, which was explanatory of 32 *Hen. 8. c. 1.*, declared that all persons *having* a sole estate or *interest* in lands, &c. might devise ;

devise; which did not include a bare possibility or hope of succession, but a possibility accompanied with an interest.

Vide Perry v. Philips,
1 Ves Jan.
251.

§ 22. *Littleton* says, that if there be two joint-tenants in fee, of lands devisable by custom, and one of them devises his share, it is void; because no devise can take effect until after the death of the devisor, and by that event the lands become immediately vested in the other joint-tenants by survivorship.

A Joint-tenancy not devisable.
Lit. f. 287.
1 Inst. 185 a.

§ 23. In conformity to this principle the statute 34 and 35 *Hen. 8.* only enables persons having a sole estate in fee simple, or seised in fee simple in coparcenary or in common to devise, which excludes estates held in joint-tenancy. And in *Butler and Baker's* case, 35 *Eliz.* it was laid down that the law only considers what estate the devisor had at the time of making his will, without regard to any subsequent event; from which it follows and has been settled, that a devise by a joint-tenant, who afterwards severs the joint-tenancy, is void; because the devisor was joint-tenant when he made his will.

3 Rep 25.
Poph. 87.

§ 24. *Richard Gilbert* and *Frances Sophia Gilbert* were seised of the premises in question as joint-tenants in fee. *Richard Gilbert* on the 20th of January 1754, made his will and thereby devised in these words. *Imprimis*, I give and bequeath all my part, right, title, and interest, which I have in an estate jointly with my sister *Frances Sophia Gilbert*, to my wife *Jane Gilbert*. By indentures of lease and release *Richard Gilbert* and

Swift v. Roberts,
3 Burr. 1488.
1 Black. R.
476.

his

his sister made a partition, and severed the joint-tenancy, and the estate in question was conveyed to *Richard*, in fee. The question was, whether the will was good. And the court was clearly and unanimously of opinion that a will made by a joint-tenant during the continuance of the jointure, was not a good will, even as to his share of the estate, under the statute of wills, notwithstanding a subsequent severance of the joint-tenancy by a partition, unless there was a republication of it after the partition.

The Testator
must be seized.

Cowp.R.305.

§ 25. When the feudal doctrine of nonalienation began to subside, and some persons were allowed to dispose of their lands by will, a devise was considered to be in the nature of an appointment to uses. The courts of law, therefore, held, that a devise affecting lands could operate only on such real estates, as the testator had at the time of executing his will, and not upon any lands acquired afterwards.

Vide 2 Vef.
Jun. 427.

3 Rep. 30 b.

§ 26. The statutes of wills adopt the same principle, for the words of these statutes are, “all and every person and persons having manors,” &c. or having a sole estate, &c.; from which, it follows, that the deviser must have the estate at the time of making his will, for he cannot devise what he has not in him at the time of devising. And in *Butler and Baker’s* case, the judges commenting on the word having, in the statutes of wills, say,—If it be asked, *quis potest legare?* the makers of the act answer, every person having manors, &c. not every person generally.

§ 27. A Person

§ 27. A person devised all such such sums of money, lands, tenements, goods, chattels, and estates whatsoever, wherewith at the time of his decease he should be possessed or invested, to his wife: the testator, nine years after making his will, received a sum of money in right of his wife, which he laid out in the purchase of an estate in *Kent* of the nature of gavelkind, and died without having republished his will. The heir at law of the testator entered, but his widow brought an ejectment to recover the possession. The jury found a special verdict stating the above facts, and that, by the custom of gavelkind, any tenant being seised of lands in fee, may devise the same by will in writing. The single question upon the verdict was, whether the lands in question, being purchased after the making of the will, could by law pass by the will, there having been no republication after the purchase. The court were unanimously of opinion, that the lands did not pass. And Lord Chief Justice *Holt* said, the lands purchased after the execution of the will did not pass by it, because the law of *England* was plain as to this point by all the precedents; and the law was the same of lands devised by custom, as of lands devised by the statute. And whenever a will was pleaded, it was always said that the testator was seised in fee, and, being so seised, made his will; which plainly shewed, that it was absolutely necessary he should be seised in fee, at the time of making his will. The judgment was affirmed by the House of Lords.

Bunker v.
Cook, 1 Salk.
239. 3 Bro.
Parl. Ca. 19.

§ 28. The deviser must not only be actually seised of the lands at the time of making his will, but must

continue

And must
continue
seised.
11 Mod. 128.
Rep. Temp.
Holt 748.

Bro. Ab. Tit.
Devise pl. 15.

continue to be seised of them until the time of his death; for a devise cannot take effect, unless the devisor dies seised: and, therefore, it is a good plea against the devisee, that the devisor did not die seised; so that, if a person devises his lands, and is afterwards disseised, and dies before entry, the devise is void. But if the devisor re-enters, the devise becomes again valid according to the opinion of Lord Chief Justice *Holt*; because, when a man is disseised, and re-enters, the disseisin is purged, and the disseisee is considered as never having been out of possession.

4 Bur. R.
1961.

Exception.

§ 29. There are a few cases in which it has been determined, that a devise operated upon property which the devisor had not at the time of making his will.

1 Salk. 238.

§ 30. Thus, where a person devised his manor of *A.*, and, before his decease, a tenancy escheated; it was admitted, that it would pass to the devisee, as being part of the manor.

Roe v. Wegg,
6 Term. R.
708.

§ 31. Mr. *Hale* devised the manor of *King's Walden* with the appurtenances, and all his messuages, lands, tenements, and hereditaments, in the parish of *King's Walden*, to *W. Hale Esq.* Mr. *Hale*, after making his will, purchased a copyhold parcel of the said manor, and held of himself as lord of the manor, and the same was surrendered to the use of Mr. *Hale* and his heirs. It was determined, that this copyhold passed by the will of Mr. *Hale*, because, in the eye of the law, the tenants of the manor are only tenants at will to the lord, who is seised in fee of the whole. When

the lord, in this case, made his will, it operated upon the whole manor, including the demesnes and services; and, when the copyhold in question was purchased by him, it was still part of the manor, and passed by a devise of the manor.

§ 32. Where articles are executed for the purchase of lands, and, before a conveyance of the legal estate is made, the purchaser devises the estate and dies, such devise will be held good in equity. For although, according to the strict rules of law, the devisor had not lands within the statute of wills, until a conveyance of the legal estate be executed, yet, after the execution of the articles, the vendor is deemed to be seised only in trust for the purchaser, who is considered in a court of equity as the real owner of the lands; and, therefore, in equity, he will be allowed to dispose of them.

Lands contracted for are devisable.
Davie v. Beardsham,
1 Cha. Ca. 39.
Acherley v. Vernon,
9 Mod. 78.

§ 33. Where an agreement of this kind is not to be carried into execution until a future day, and, previous to such day, the purchaser makes his will, yet the lands thus agreed for will pass by such will.

§ 34. By articles dated *April 1706*, it was agreed between the vendors and the agent of the purchaser, that the possession of the lands, agreed to be purchased, should be delivered at *Michaelmas* following, and proper conveyances be executed; and the agent covenanted that the purchase-money should be paid, when possession was delivered. In *June* following, the purchaser made

Greenhill v. Greenhill,
Prec. Ch. 320.

made his will ; and the question was, whether these lands passed by it.

Lord *Cowper* decreed that they did : and, upon an appeal to Lord Keeper *Harcourt*, it was argued by Sir *Joseph Jekyll* and Mr. *How*, that this decree ought to be reversed. They took a distinction between an agreement for the immediate purchase of lands, and such an agreement for the future purchase thereof, as this was. They agreed that, if the articles had been for the present purchase of these lands, the vendor would immediately have become a trustee for the purchaser, and then a devise of them would have been good in equity. But, here, the possession was not to be delivered until *Michaelmas* following, nor was any money to be paid before that time ; and then the purchaser had no power to devise them sooner.

On the other side, it was said in support of the decree, that these lands were bound immediately from the execution of the articles ; that the possession, not being to be delivered until a future time, made no difference in equity. That, if the purchaser had died before *Michaelmas*, the equity would have descended to the heir ; and he might have brought a bill against the executors, to compel the payment of the purchase-money out of the personal estate.

Lord Keeper said, he saw no reason to vary this decree : he thought that such future interest was devisable, as well as if it had been in possession ; that the

lands and money were mutually bound by the articles, and, therefore, he affirmed the decree.

§ 35. Even a parol agreement for the purchase of lands, which is admitted, so as to be binding on the parties, notwithstanding the statute of frauds, will vest such an interest in the purchaser, as he may devise by his will.

§ 36. In the year 1743, a parol agreement was made between *Brown* as agent for *Mrs. Hughes*, and *Mr. Potter* and *Westley* as agents for the Archbishop of *Canterbury*, for the purchase of an estate in the *Isle of Wight*. The plan and particulars of the estate were delivered to *Westley*; and, *June 7th* 1744, the parties met; a price was fixed; and it was agreed by parol, that the purchase should be completed the *Christmas* following. In *July* 1744, the title-deeds were delivered to *Westley*, to abstract, and deliver to the purchaser's counsel, which was done in *April* 1745. The further proceeding was interrupted by the claim of *William Huxley* to part of the estate. A bill was filed: and it was referred to the Master to inquire into this contract, who reported in *February* 1746, that it was a beneficial one; and the next day, *Westley* received instructions from the Archbishop to draw conveyances, which he did, by preparing a lease and release to make the Archbishop tenant of the freehold, for suffering a recovery, to the use of the Archbishop and his heirs, and a deed of bargain and sale, which was approved of on behalf of the Archbishop. On the 17th of

Potter v.
Potter, 1 Vel.
437.

September 1746, they were carried to the Archbishop, who returned them to be engrossed; and they were actually engrossed in his lifetime, but were not executed as intended.

The Archbishop had made his will in 1745; and on the 10th of *April* 1747, long after this agreement, made a codicil ratifying and confirming his will. And the question was, whether the estate thus agreed for should pass by his will and codicil?

Sir *John Strange* M. R. said, one circumstance was wanting,—the reducing the agreement into writing according to the statute of frauds; which, if done in 1744, the estate would certainly be considered as the Archbishop's, in equity, from that time. But, though an agreement was not reduced into writing, and signed by the party, yet it was well known that, if confessed or in part carried into execution, it would be binding on the parties, and here was the fullest admission thereof. And, as the will was re-published by the codicil, it would pass this estate.

§ 37. There must, however, be express articles, or a positive agreement, for the purchase of an estate, entered into, and completed, before the execution of a will, otherwise such an estate will not pass by it.

Longford v.
Pitt, 2 P.
Wms. 629.

§ 38. Mr. *Longford* entered into articles with Governor *Pitt*, for the sale of lands in *Cornwall*. Governor *Pitt*, long before the execution of the articles,
made

made his will : and the question was, whether the lands comprised in the articles passed by the will ? And it was held that they did not.

§ 39. A term for years, purchased after the execution of a will, passes by it ; because it is only a chattel real : and the will, in this instance, operates as a testament, and not as a devise, either by custom or by statute.

And Terms
for Years ac-
quired after
the Will.
1 P. Wms. 575.
3 Atk. 176.

TITLE XXXVIII.

DEVISE.

CHAP. IV.

Of Devises of Copyholds.

- | | |
|---|--|
| <p>§ 1. <i>Copyholds devisable by Surrender to Uses.</i></p> <p>14. <i>A Surrender to the Use of a Will bars an Intail.</i></p> <p>16. <i>An equitable Interest is devisable without a Surrender.</i></p> | <p>19. <i>An equitable Intail barred by a Will.</i></p> <p>21. <i>Where a Surrender will be supplied.</i></p> <p>26. <i>Surrender not supplied where Freeholds pass.</i></p> |
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Section I.

Copyholds
devisable by
Surrender to
Uses.

Gilb. Ten.

3²².
1 Int. III b.
n. 1.

AS the statutes of wills only mention lands held by knight service, and in socage, they do not extend to copyhold estates. But a power of devising them has long been indirectly exercised by an application of the doctrine of uses, similar to that which was anciently resorted to, in respect to freehold lands; the copyholder surrenders his estate to the use of his last will, and then disposes of it by his will, which operates as a declaration of the uses of the surrender, and not as a devise under the statute of wills.

§ 2. By the general custom of all manors every copyholder has a right to surrender his estate to the use of his will; and in a modern case it was held that if there was a custom in a manor that copyholds should

Pike v.
White,
3 Bro. Rep.
286.

should not be surrendered to the use of a will, such a custom would be deemed void.

§ 3. An estate in remainder or reversion in a copyhold may be surrendered to the use of a will, as well as an estate in possession.

§ 4. It was held in 10 *Jac.* that where a copyholder surrenders his estate to the use of his will, and afterwards makes a will, the lands do not pass by the will, but by the surrender; for the will is only declaratory of the uses of the surrender.

Semaine v.
1 *Bullst.* 200.

§ 5. Where a woman surrenders a copyhold to the use of her will, and afterwards marries, the surrender is suspended during the marriage; and a devise of the copyhold by the wife is void, notwithstanding that by articles previous to the marriage the husband agreed that she should have power to devise.

§ 6. *Ann Thornbury*, widow, surrendered a copyhold estate to the use of her will. Soon after she married, but previous thereto she entered into articles reciting the surrender, and that the intended husband agreed that she should have power to settle her estate, or to devise the same during coverture without his contradiction. The wife made her will reciting her power under the articles. The question was whether this devise was good. Lord Ch. Just. *Willes* delivered the opinion of the court, and laid down these two propositions. 1st, That a feme covert could not make a will of lands. 2d, That the surrender by her

George v.
Amb. 627.

when sole, became void, or at least was suspended by the marriage. As to the first it was contrary to the 34 and 35 *Hen.* 8. that a feme covert should make a will; for by that statute wills made by feme coverts were void in law. But it was argued that the consent of the husband, by the articles, gave her the power of devising, though by law she could not otherwise do it, and many cases were cited to prove this doctrine. But they were all cases of wills of personal estates made by virtue of such an agreement. And there could be no doubt but the husband might give her a power to dispose of her personal estate, because by the marriage he had the sole property in and power over it; but it was otherwise of lands of inheritance belonging to the wife, and he could not give her such a power to make a will in prejudice of her heir at law. Judgment that the will was void.

Roe v. Hicks,
Tit. 10. c. 5.
f. 3, 4.

§ 7. In the case of a surrender by a copyholder to the use of his will, and a devise thereof, the devisee has no title till he is admitted.

§ 8. A surrender of a copyhold to the use of a will, only operates on the estate which the copyholder has at the time of the surrender.

Warde v.
Warde,
Amb. 299.

§ 9. *Thomas Warde* made his will, and reciting that he was seised of a copyhold estate (whereas in fact he was not) devised all his real estate, &c. He afterwards purchased a copyhold estate, and surrendered it to such uses as he by his last will and testament should appoint, and afterwards died without making

making any other will. Lord *Hardwicke* held that the copyhold did not pass by the will, 1st, Because the surrender was to a future appointment. 2d, Because the words of the will did not extend to an after purchased copyhold, but only to such of which he was seized at the time of making it.

§ 10. It was resolved in a modern case that where a copyholder, having an estate *pur autre vie*, surrendered all his estate in possession, remainder, or expectancy to the use of his will; and afterwards acquired the fee by descent, such fee did not pass by the will.

Doe v. Cowling,
6 Term Rep.
63.

§ 11. A copyhold estate purchased after a will is made does not pass by it, unless the surrender of such copyhold to the uses of the will be considered as a republication of it.

Harris v. Cutler,
1 Term Rep.
438. note.
Vide ch. 7.

§ 12. A surrender to the use of a will is not defeated by a subsequent surrender, where there is no actual admittance on such subsequent surrender.

§ 13. A copyhold estate was surrendered in 1733 to the use of *Thomas Gower* and *Elizabeth* his wife, for their lives, remainder to the heirs and assigns of *Thomas*. They were accordingly admitted and *Thomas Gower* then surrendered to the use of his will. Upon the death of *Elizabeth Gower*, *Thomas* in 1744 surrendered the premises to the intent that the lord should regrant them to the use of the said *Thomas* and his heirs, till his marriage with *Sarah Burroughs*, and

Thrustout v. Cunningham,
2 Black. R.
1046.

then to the use of the said *Thomas* and *Sarah* for their respective lives, remainder to the heirs of their two bodies, remainder to the right heirs of *Thomas*. No admission was had by *Thomas* under this surrender. In 1757 *Thomas Gower* devised the premises to *Sarah* his wife for life, remainder to *John Gower* his youngest son and *Martha* his wife for their lives, and died. The question was, whether the will was good. It was argued against the will that by the surrender in 1744 every thing passed out of *Thomas Gower* the devisor, consequently there was an end of the surrender to the use of his will in 1733. And never having been admitted, nor of course surrendered to the use of his will, in consequence of the new limitations in 1744 nothing passed by the will of 1757. But the court unanimously held that the old use in fee granted to *Thomas Gower* in 1733 to which he was then admitted, and which was surrendered to the use of his will, was not taken out of him by the new limitation and surrender of 1744. He had therefore no occasion to be re-admitted to it, for the purpose of surrendering to the use of his will, but should be construed to be in, as of his old estate.

A Surrender
to the Use of
a Will bars an
Intail.
Tit. 37. c. 2.
f. 18.

Moore v.
Moore,
Amb. 279.
2 Vef. 601.

§ 14. It has been stated in the preceding title that in many manors a surrender to a stranger and his heirs, was sufficient to bar an intail. This doctrine has been extended to surrenders made to the use of the surrenderor's will. And Lord *Hardwicke* has said, "Where a copyholder seised of an estate
" tail, surrenders to the use of his will, if intails by
" the custom of the manor are not barrable by reco-
" very

“ very or fine, but by surrender; in such case the
 “ surrender to the use of his will, not only effectuates
 “ the will, but operates as a bar to the intail.”

§ 15. The same point was determined by the Court of Common Pleas, it being held by three judges that the intail of a copyhold was barred by a surrender to the use of a will, where there was no custom of barring intails by recovery against the opinion of Lord Ch. Justice *Willes*, who thought that a recovery was the proper mode.

Carr v.
 Singer,
 2 Vef. 604.

§ 16. Where the legal estate in a copyhold is outstanding, the person entitled to the equitable interest may devise it without a surrender: for otherwise it could not be disposed of by will, as a person who has not the legal estate, cannot make a surrender.

An Equitable
 Interest is de-
 visable with-
 out a Surren-
 der.
 1 Vef. 489.

§ 17. It follows from this principle that an equity of redemption of a copyhold may be devised without a surrender; provided the mortgagee has been admitted. But a mere surrender of a copyhold estate to the use of a mortgagee, without admittance, does not divest the legal estate out of the copyholder; for he still continues tenant to the lord; and must therefore surrender to the use of his will.

King v. King,
 3 P. Wms.
 359.
 1 Bro. R. 481.

§ 18. Thus in a modern case it appeared that copyhold estates were not surrendered to the use of a will, but being in mortgage they were surrendered to the use of the mortgagees, which was urged in answer to the objection for want of a surrender to the use of the will.

Kenebel v.
 Scrafton,
 8 Vef. Jun.
 30.

will. The mortgagees had not been admitted. Lord *Eldon* held clearly that under these circumstances there must be a surrender by the mortgagor to the use of his will.

Doe v. Wroot,
5 East R. 132.

An equitable
Intail barred
by a Will.

§ 19. A will alone bars an intail of a trust estate in a copyhold without a surrender.

Otway v. Hudson,
2 Vern. 583.

§ 20. *A.* was tenant in tail of the trust of a copyhold, remainder to *J. S.* *A.* requested the trustees to surrender to him in tail, which they refusing, he brought a bill to compel them, and they put in their answers. Then *A.* died, but pending the suit he went to the lord's court, and desired to be admitted to surrender, which was refused, because the legal estate was in the trustees. Upon which *A.* by will devised the premises to his wife, &c. Lord *Cowper* decreed the estate to go according to the will, there having been no laches in the testator; and having devised the estate to the uses and purposes in his will, his Lordship conceived that was sufficient to bar the intail of a trust.

Contra,
1 H. Black.
R. 461.

Where Sur-
render will be
supplied.
Tit. 37.
ch. 1. f. 77.

§ 21. It has been stated in the preceding title that the Court of Chancery will supply the surrender of a copyhold in favour of three descriptions of persons, namely, creditors, wife, and children. And therefore, if a person devises a copyhold for the benefit of persons of this kind, without surrendering it to the use of his will, a court of equity will supply the defect.

§ 22. In the case of creditors, the court will only supply a surrender, where the other estates, which are liable to the payment of the debts, are not sufficient.

§ 23. A person devised all his real estates to trustees, for payment of his debts; and, having freehold and copyhold, he neglected to surrender the copyholds to the use of his will.

Drake v.
Robinson,
1 P. Wms.
238.

Upon an application to the Court of Chancery, to supply a surrender of the copyholds, the Lord Chancellor directed that the Master should first see, whether there was enough without the copyhold, for payment of the debts.

Rafter v.
Stock,
1 Ab. Eq. 123.
Bixbey v.
Eley, 2 Bro.
R. 325.

§ 24. In supplying a surrender in favour of a wife, the court respects the claim of the heir at law, so far, that it will not interpose, if the heir would thereby be left unprovided for. But, in a modern case, the court supplied a surrender in favour of a wife, against a distant heir not provided for by the testator, though provided for *aliunde*. And, in another case, the want of a surrender was supplied in favour of a widow against co-heiresses, daughters of the devisor, and infant grand-daughters, by deceased daughters; the Chancellor being of opinion, that the court is to look only to the object, not to the circumstances of the parties; as, whether the heir has a provision or not.

Kettle v.
Townsend,
1 Salk. 187.

Chapman v.
Gibson, 3
Bro. R. 229.

Hills v.
Downton,
5 Ves. Jun.
557.

§ 25. With

Rofs v. Rofs,
1 Ab. Eq.
124.

Pike v.
White,
3 Bro. R.
229.

Rumbold v.
Rumbold,
3 Vef. Jun.
65.

A Surrender
not supplied
where Free-
holds pass.

§ 25. With respect to younger children, there have been various opinions as to the circumstances, under which the court ought to interfere. And it was formerly held, that the court would not supply a surrender in favour of younger children, where the heir would thereby be disinherited; or the younger children put in a better situation than the eldest son. It was afterwards laid down that, if the heir was provided for, though not by the testator, but *aliundè*, a surrender would be supplied in favour of the younger children; and that the court would not enquire into the *quantum* of the provision; and that a younger child being put in a better condition than the elder was no objection.

§ 26. Where there is a general devise, equally applicable to freehold and copyhold estates, and the testator has freehold estates to satisfy the words of the will, a court of equity will not supply a surrender.

Rofs v. Rofs,
1 Ab. Eq.
124.

Bullock v.
Bullock,
2 Ab. Eq.
231.
Challis v.
Casborne,
Prec. in Cha.
408.

§ 27. A person, seised of freehold and copyhold lands in *Bereford*, devised all his lands in *Bereford* to his wife and her heirs, without having surrendered the copyhold to the use of his will. The court refused to supply the want of a surrender, because the words of the devise were satisfied by the freehold lands, which passed by the will; and it was not certain that the testator intended to give the copyholds.

§ 28. A person

§ 28. A person having freehold and copyhold estates, devised all the rest and residue of his estate to his wife, in fee; but did not surrender his copyholds to the use of his will. The widow insisted, that equity ought to supply a surrender of the copyhold.

Byas v. Byas,
2 Vef. 164.

Sir *John Strange*, M. R. said, “ There is no case, “ where there is freehold as well as copyhold, and “ no notice taken of the copyhold in the will, that “ the court has supplied the want of a surrender; “ where copyhold lands are devised expressly to wife, “ children, or for creditors, nothing passes in point “ of law for want of a surrender. However, a court “ of equity supplies it in these favourable instances, “ for the purposes of the will, but not for others, “ which is on the plain declaration of the testator, by “ expressly naming copyhold estates. If he had none “ but copyholds, *all my real estate* would have been “ sufficient to pass the copyhold, though no surrender “ had been made to the use of the will; but the “ general heir at law, or heir by particular custom, “ has always been so favoured as not to be disinherited by implication or inference from the particular wording of the will. The cases, that have been, “ have turned on the construction of these words, “ upon the question of fact, whether the testator had “ what would answer the words of his will, on which “ the words would operate? Then the surrender “ should not be supplied, as was the case before Lord “ *Talbot* in 1735, and the case of *Bethlem* hospital, “ 10 June 1736, that *all my lands* would not pass “ copyhold

Brook v.
Gurney,
5 Ves. Jun.
559.

“ copyhold lands not surrendered, if there were other
“ lands to satisfy it. But, if surrendered, that will
“ explain the general words and pass it; there is
“ that, which would come within the description of
“ real estate. Then, without surrender to the use of
“ the will, or mention of copyhold, the court will
“ not take it from the heir.”

TITLE XXXVIII.

D E V I S E.

CHAP. V.

Of the Solemnities necessary to a Devise.

- | | |
|---|---|
| <p>§ 1. Statute of Frauds.
 2. What is required by this Statute.
 3. Writing.
 7. Signing.
 14. Attestation by Witnesses.
 19. Wills and Codicils must be separately attested.
 24. The Witnesses must see the whole Will.
 26. And must attest in the Presence of the Testator.
 35. The Witnesses may attest at different Times.
 38. Who may be Witnesses.
 43. Publication.
 46. A Person cannot empower himself to give Lands by a Will not duly attested.</p> | <p>48. Wills that charge Lands are within the Statute.
 49. Exception. — Codicil giving Legacies.
 51. Wills of Trust are within the Statute.
 53. And of Mortgages and Equities of Redemption.
 54. And of Money to be laid out in Lands.
 55. And Wills made abroad.
 56. Wills of Terms for Years not within the Statute.
 57. Exception. — Terms to attend.
 59. Wills of Copyholds not within the Statute.
 65. Wills may be proved in Chancery.</p> |
|---|---|

Section 1.

AS the statutes of wills did not require any precise form or ceremony in a devise of lands, but only that it should be in writing, and, as lands devisable by custom would pass by a will made by parol only, an infinite number of frauds were thereby committed. To prevent these, it was enacted by the statute 29 Cha. 2. c. 3. §. 5. “ That all devises and bequests of any lands or tenements devisable, either by force of the statute

Statute of
Frauds.

“ of wills, or by this statute, or by force of the cus-
 “ tom of *Kent*, or the custom of any borough, or any
 “ other particular custom, shall be in writing, and
 “ signed by the party so devising the same, or by some
 “ other person in his presence and by his directions,
 “ and shall be attested and subscribed in the presence
 “ of the devisor by three or four credible witnesses, or
 “ else they shall be utterly void and of none effect.”

What is re-
 quired by
 this Statute.

§ 2. In consequence of this statute, the following circumstances are now absolutely necessary to the validity of a devise. 1st, That it be written. 2d, That it be signed by the party himself, or by some other in his presence, and by his express directions. 3d, That it be attested by three witnesses in the presence of the testator.

Writing.

§ 3. A devise of lands and tenements must be reduced into writing in the lifetime of the devisor; for it is not sufficient that it be put into writing after his death, being first declared by words only; for then it is but a nuncupative will.

§ 4. It is not material on what matter or stuff, whether paper or parchment, or in what language, whether *English*, *Latin*, *French*, &c. or in what kind of handwriting or character a devise is written, so that it be fair and legible, and the meaning be sufficiently apparent. Neither is it material, whether it be written at large, or by notes usual or unusual; or whether sums of money given be expressed at full length or in

figures, provided it be free from all doubt and ambiguity.

§ 5. Thus, where a bill, in which legacies charged on lands were written in figures, was scarcely legible, it was referred to a master to examine and see what those legacies were, and he was directed to call to his assistance persons skilled in the art of writing.

Masters v. Masters,
1 P. Wms. 425.

§ 6. A will may be written at several times, and on several sheets of paper unconnected with each other; although the proper mode, where a will is written on several sheets of paper, is, to join them together by means of a piece of tape sealed.

§ 7. The next circumstance necessary to the validity of a devise of lands, is, that it be signed by the testator, or by some other person in his presence, and by his direction. The latter part of this clause was inserted for the benefit of those persons, who, from sickness, or some other misfortune, are incapable of writing their names, or making their marks.

Signing.

Where a will is written on several sheets of paper, it is the usual practice for the testator to sign each of them.

§ 8. Signing was chosen rather than sealing and delivery, which are the solemnities required in deeds, because seals, which were formerly a great mark of distinction in families, were much disused when this

Gillb. Repl
261.

statute was made, and people sealed with any seal; so that signing, as used in the civil law, was preferred.

§ 9. If the testator's name be written by himself in any part of the will, either at the beginning or the end, it will be considered as a sufficient signing within the statute.

Lemayne v.
Stanley,
3 Lev. 1.

§ 10. A person wrote his will with his own hand, beginning thus: "I *John Stanley* make this my last will and testament," and put his seal, but did not subscribe his name to it. This was adjudged to be a good will, for, being written by himself, and his name in the will, it was a sufficient signing within the statute, which does not appoint where the will shall be signed, at the top, bottom, or margin; and, therefore, a signing in any part was sufficient. And three of the judges were of opinion, that the putting his seal had, of itself, been a sufficient signing within the statute of frauds; for *signum* was no more than a mark that it was his will.

§ 11. The position laid down in the preceding case, that sealing a will is a sufficient signing within the statute of frauds, is very doubtful; for, although Sir *John Strange* reports, that in 13 *Geo. 1.* on an issue directed out of Chancery *deviseavit vel non*, the Chief Justice ruled, that sealing a will, was a signing within the statute of frauds, yet, in a subsequent case, 25 *Geo. 2.* it was said by Lord Chief Baron *Parker*, Baron *Clive*, and Baron *Smythe*, (absent *Legge*), that the opinion advanced in 3 *Lev. 1.* that sealing was a sufficient signing,

Warneford,
v. Warneford,
2 Stra. 764.

Smith v.
Evans, 1 Will.
R. 313.

ing, was a strange doctrine; for, if it were so, it would be very easy for a person to forge any man's will, by only forging the names of any three obscure dead persons, as there would be no occasion to forge the testator's name. And the Barons said, if the same should come in question again; they should not hold that sealing a will only, was a sufficient signing within the statute.

2 Vef. 459.
1 Vef. Jun. 13.

§ 12. The want of signing all the sheets of a will cannot be supplied; so that, although the devisor should intend to sign, but becomes incapable of doing it by sickness, such a will cannot take effect.

§ 13. A will was prepared and written on five sheets of paper, and a seal affixed to the last, and also the form and attestation written on it. The will was then read over to the testator in the presence of three witnesses, who afterwards subscribed it; and the testator set his mark to the two first sheets in their presence, and attempted to set it to the third, but being unable from the weakness of his hand, he said I cannot do it, but it is my will. After this, the three witnesses went away, being desired to come again. The testator died without setting his mark to the three last sheets. Lord *Mansfield* said, that the will was not duly executed, for, when the testator signed the two first sheets, he had an intention of signing the other sheets, but was not able; he, therefore, did not mean the signature of the two first sheets as a signature of the whole will. There never was a signing of the whole. The court, to be sure, would lean in support of a fair will, and

Right v.
Price,
Doug. 241.

not defeat it for a slip in form, where the meaning of the statute had been complied with. Adjudged, that the will was not duly executed.

Attestation by
Witnesses.

Gilb. Rep.
261.

§ 14. The third circumstance required by the statute of frauds is, that a will shall be attested and subscribed in the presence of the testator, by three or four credible witnesses. And the statute, in this instance, adopts the mode prescribed by the civil law, in *testamentis solemnibus*; not as laid down in *Justinian's Institutes*, but as reformed by the code in the Novels. And the evil meant to be remedied by the framers of the statute of frauds, was, the secret and private manner in which wills were formerly executed.

3 P. Wms.
254.

§ 15. Where the testator owns his handwriting before the witnesses, it is sufficient, though they do not see him sign his name. And in the case of *Stonehouse v. Evelyn*, in proving a will disposing of real estates, the proof was full, that the three subscribing witnesses did subscribe their names in the presence of the testatrix; but one of them said, he did not see the testatrix sign, but that she owned, at the same time that the witnesses subscribed, that the name signed to the will was her own handwriting, which his Honour, (Sir Joseph Jekyll), held, without all doubt, to be sufficient.

Grayson v.
Atkinson,
2 Ves. 454.

§ 16. On a bill to establish a will against an heir-at-law, he, by his answer, made a doubt whether, as all the witnesses did not see the testator sign, this was a good attestation within the statute.

Lord *Hardwicke*.—"This has been *vexata questio* a great while, whether, to make a will effectual according to the statute, the signing of the testator thereto should be in the presence of all, or, indeed, of any of the witnesses; or, whether the testator's acknowledging the handwriting to that will to be his, is not sufficient? It is insisted, that the word attested superadded to subscribed, imports they shall be witnesses to the very act and *factum* of signing, and that the testator's acknowledging that act to have been done by him, and that it is his handwriting, is not sufficient to enable them to attest, that is, it must be an attestation of the thing itself, not of the acknowledgement. To be sure, it must be an attestation of the thing in some sense; but the question is, if they attest upon the acknowledgement of the testator that it is his handwriting, whether that is not an attestation of the act: and whether it is not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved? At the time of making the act of parliament, and ever since, if a bond or deed is executed by the person who signs it, afterwards the witnesses are called in, and before those witnesses he acknowledges it to be his hand, that is always considered to be a signing by the person executing, and is an attestation of it by them. The case of *Lemayne v. Stanley* is an express authority, and must have been by an acknowledgement of the testator's hand. No answer can be given to it, but a presumption that the testator might write the will in the presence of the three witnesses, but this

Ante f. 102

“ is not a natural presumption ; for, if the fact was
 “ so, it would have been found by the jury, as it
 “ would have put it out of all doubt. Therefore, on
 “ the penning of the act, and the authorities, my opi-
 “ nion is, that this will is well executed : but, being
 “ a question of law, if the heir insists on having it
 “ tried, I will direct a trial.” A trial was accordingly
 directed.

Ellis v. Smith,
 1 Ves. Jun. 10.

§ 17. The doctrine here laid down, was soon after
 fully confirmed by a determination of Lord *Hardwicke*,
 assisted by Sir *John Strange*, Lord Chief Justice *Willes*,
 and Lord Chief Baron *Parker*, in which, it was un-
 animously resolved, that the declaration of a testator,
 before three witnesses, that a paper was his will, was
 equivalent to signing it before them, and constituted a
 good will within the fifth section of the statute of frauds.
 Lord *Hardwicke* and Lord Chief Justice *Willes* observed,
 that if, in a case of separate attestation, the testator
 actually signs the will each time, it is bad, because there
 are three separate executions, and no one good with-
 in the statute.

Vide 1 Ves.
 Jun. 17ⁿ.

Harrison v.
 Harrison,
 8 Ves. Jun.
 185. Id. 504.

§ 18. It has been determined in a late case, that an
 attestation of a devise, by the witnesses setting their
 marks to the will, was good within the statute of
 frauds.

Wills and Co-
 dicils must be
 separately at-
 tested.

§ 19. Every will, and every codicil, must be sepa-
 rately attested by three witnesses ; for the attestation of
 two witnesses to a will, and of a third witness to a
 codicil, annexed to that will, is not sufficient. Nor
 can the attestation of a codicil operate in any case as
 the

the attestation of a will, to which it is declared to be annexed.

§ 20. A person made his will in writing, by which he devised lands, and sealed and published it in the presence of two witnesses only, who subscribed it in his presence. A year after, he caused another writing to be prepared, which recited that he had made his will, and confirmed it in all things, and said,—“ And “ my will is, that this codicil be taken to be of force, “ and part of my will.” It was found, that the codicil was signed by two witnesses, one of whom was witness to the will, the other not; and it was further found, that this codicil was distinct from, and not annexed to the will. Lord Chief Justice *Holt* delivered the opinion of the court, that this will was not duly attested according to the statute, for it had not three witnesses, nor was the codicil sufficient to pass lands.

Lea v. Libb,
Rep. Temp.
Holt. 742.

§ 21. A person devised freehold lands to a college, by a will written in his own hand, but not attested by any witness. The testator afterwards made a codicil, attested by four witnesses, wherein he recited his will. It was determined, that the attestation of the codicil could not operate so as to render the will valid; for the codicil might be executed in another place, and the witnesses might not either see or know any thing of the will.

Att. General
v. Barnes,
Gilb. Rep. 5.

Pimphraze v.
Laufdown,
cited 1 Com.
Rep. 384.

§ 22. But if a will be made at several times, although the parts be distinct and separately signed by the testator, yet, if it appear from circumstances, to

have been the intention of the testator, that both instruments should constitute but one will, and not operate as a will and a codicil, an attestation of the last part by three witnesses will amount to an attestation of the whole.

Carlton v.
Griffin.
1 Bur. 549.

§ 23. *John Griffin*, on the 2d May 1752, wrote upon a sheet of paper with his own hand as follows: “ Know all men by these presents, that I *John Griffin* “ make the afore-mentioned my last-will and testa- “ ment;” he then proceeded to give two freehold houses, and subscribed it, but there was no witness. In *January* 1754, he wrote on the same sheet of paper the following words: “ Memorandum.—Whereas I “ have laid out, &c. on a lighter, &c. and the barge “ called the *Lemon*, &c. all shall be at my wife’s disposal, and this not to disannul any of the former “ part made by me the 2d of *May* 1752, except that “ my wife shall not be liable to pay to my son *John*, “ &c. Witness my hand, *J. Griffin*.” The will was written on the first and second sides of a sheet of paper, and the memorandum was begun either upon the end of the second, or the beginning of the third, and written upon the third side. And all the second writing related only to the personal estate. The testator subscribed this in the presence of three witnesses, and then he took the said sheet of paper in his hand, and declared it to be his last-will and testament in the presence of the said three witnesses, and then delivered it to them, and desired they would attest and subscribe it in his presence, which they accordingly did. The question

question was, whether this will was duly attested according to the statute of frauds.

Lord *Mansfield* said, the case was accurately stated, for it was not stated to be either a will or a codicil, but a sheet of paper written, &c. At first, in 1752, the testator did not know that any witnesses were necessary. In 1754, he had found they were necessary; then he made a subsequent disposition, which was a memorandum to be added to it. But he did not call it a codicil, nor did the case state it to be so; he plainly considered the whole as one entire disposition; and he expressly declared in the latter, that he did not thereby mean to disannul any part of the former devise or dispositions. There is not a tittle in the latter that relates to the real estate, therefore, the only intent of having the three witnesses was, and must be, to authenticate the former. Then the publication of it was, as of a will, he took up the sheet of paper and said, it is my will, and certainly he did not mean a part of it only, but the whole of it; and he desired them to attest it: all this must relate to the whole that was written on the paper. Adjudged, that the will was duly attested.

§ 24. The witnesses ought to see the whole will, for if they only see the last sheet, on which they subscribe their names, it is doubtful whether that be sufficient. But the presumption is, that all the sheets on which a will is written, is in the room where the witnesses attest, unless the contrary be proved.

The Witnesses must see the whole Will,
3 Mod. 263.

Bond v. Seawell.

3 Burr. 1773,

1 Black. R.

407.

§ 25. Sir *Thomas Chitty* made his will, consisting of two sheets of paper, all in his own handwriting, and signed his name at the bottom of each page. The sentences and words were so connected from the bottom of each page to the top of the next, and particularly from the fourth side of the first sheet, to the first side of the second sheet, that they were imperfect and nonsensical if read apart, but clear and intelligible when read together. He also made a codicil in like manner on a single sheet. The testator then called in *Francis Harding*, shewed him both sheets of the will, and his signature to every page; told him that was his will, and also shewed him the codicil, and desired him to attest both, which he did on the last sheet of the will, and on the codicil, in the presence of the testator, and then left the room. *John Vaughan* and *John Leyland* came in immediately afterwards; the testator shewed them the codicil, and the last sheet of the will, and sealed them in their presence; took each of them up, and severally delivered them as his act and deed. These witnesses then attested the same in the testator's presence, but never saw the first sheet of the will, nor was it produced to them; nor was the same, or any other paper, on the table. After the testator's death, both sheets of paper were found in his bureau, not pinned together, but wrapped up together with the codicil in one piece of paper. The question was, whether the will was duly attested according to the statute of frauds. The case was several times argued before all the Judges in the Exchequer Chamber, and Lord *Mansfield* acquainted the Bar, that there had been a conference amongst all the Judges, except Mr. Baron

Adams,

Adams, who was out of town, upon this case, which was an amicable suit, to try the real merits of the question. It occurred to the Judges, that the way in which the parties had put the case, did not go to the whole merits; because, if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will, and a good attestation of the whole will; but if the first sheet was not then in the room, a doubt might arise whether it was, or was not, a good attestation as to the real estate. However, no opinion was given or formed by the Judges upon such doubt which might so arise, if it should appear that in fact the first sheet was not then in the room. A will, properly attested, may, by reference to another instrument, establish particular clauses so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will *verbatim*; and there were references in this will from one part to another. Every presumption ought to be made by a jury in favour of such a will, when there was no doubt of the testator's intention. It was not necessary that the witnesses should attest in the presence of each other, or that the testator should declare the instrument he executed to be his will; or that the witnesses should attest every page, folio, or sheet; or that they should know the contents; or that each folio, page, or sheet, should be particularly shewn to them. This had been settled. But the fact, whether the first sheet of the will was, or was not in the room, at the time of the executing and attesting the latter, might be material to be known. If it was, the jury ought to find for the will generally; and

Acherley v.
Vernon,
Com. Rep.
381.

and they ought to find all things favourable to the will. If it was doubtful, whether the first sheet was then in the room or not, they all thought the circumstances sufficient to presume that it was in the room, and that the jury ought to be so directed. But, upon a special verdict, nothing could be presumed; therefore, they were all of opinion, that it ought to be tried over again. And if the jury should be of opinion that it was then in the room, they ought to find for the will generally; and they ought to presume, from the circumstances proved, that the will was in the room.

And must
attest in the
Presence of
the Testator.

§ 26. The statute expressly requires that the witnesses should attest, and subscribe the will, in the presence of the testator, lest another will should be obtruded instead of the real one.

Broderick v.
Broderick,
1 P. Wms.
239.

§ 27. Thus, where a person subscribed his will in the presence of three witnesses, who, for the ease of the testator, went down into another room and subscribed it there, it was held to be void.

§ 28. But if there be a possibility of the testator's seeing the witness attest, it will be sufficient, unless the contrary is proved.

Shires v.
Glascock,
Salk. 688.
1 Ld. Raym.
507.

§ 29. A testator desired the witnesses to go into another room, seven yards distant, to attest his will, in which there was a window broken, through which the testator might see them, and it was held, that this will was well attested according to the statute; for it was sufficient that the testator might see the witnesses, and

not necessary that he should actually see them ; for, in that case, if a man should turn his back, or look another way, it would vitiate the will : so if the testator being sick should be in bed, with the curtains close.

§ 30. There were four witnesses to a will, one of whom was gone beyond sea ; two of them swore that they saw the will executed by the testator, and that they subscribed the same in her presence ; the third swore that he subscribed the will as a witness in the same room, and at the request of the testatrix. Lord *Cowper* doubted as to the proof of the execution of the will. And the matter coming on again before Lord *Macclesfield*, he observed, 1st, That the proper way of examining a witness to prove a will of land, was, that the witness should not only prove the execution of the will by the testator, and his own subscribing it, but likewise, that the rest of the witnesses subscribed their names in the presence of the testator ; and then one witness proves the full execution of the will, since he proves that the testator executed it, and also, that the three witnesses subscribed it in his presence. 2d, He held, that the bare subscribing of the will by the witnesses in the same room did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room, in a clandestine fraudulent way ; and then it would not be a subscribing by the witnesses in the testator's presence, merely because in the same room. But it being sworn by the witness that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and, therefore, the will was well executed.

Longford v.
Eyre, 1 P.
Wms. 740.

§ 31. A woman

Caffon v.
Dade, 1 Bro.
R. 99.

§ 31. A woman having a power (though covert) to make a writing in the nature of a will, ordered a will to be prepared, and went to an attorney's office to execute it, but being asthmatic, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her, who, after having seen her execute it, returned into the office to attest it, and the carriage was put back to the window of the office, through which, it was sworn by a person who was in the carriage, that the testatrix might see what passed. Immediately after the attestation, the witnesses took the will to her, which she folded up, and put into her pocket. It was decreed, that the will was well attested.

§ 32. Although the witnesses to a will must subscribe in the presence of the testator, yet the statute of frauds does not require that this circumstance should be taken notice of in the attestation; and, whether inserted or not, the fact, if denied, must be left to the jury; for neither the insertion nor omission of this circumstance is conclusive.

Hands v.
James.
Com. Rep.
530, Willes
R. 1. S. P.

§ 33. In ejectment by an heir at law, the question for the opinion of the court was, whether it should be left to a jury to determine whether the witnesses to a will, being all dead, set their names in the presence of the testator, and this merely upon circumstances, without any positive proof. *Per curiam*, this is a matter fit to be left to a jury, which is all that is referred to the court; the witnesses, by the statute of frauds, ought to set their names, as witnesses, in the presence of the testatrix, but it is not required by the statute that this should

should be taken notice of in the subscription to the will; and, whether inserted or not, it must be proved. If inserted, it does not conclude, but it may be proved *contra*, and the verdict may find it *contra*; then, if not conclusive when inserted, the omission does not conclude it was not so, and, therefore, must be proved by the best proof which the nature of the thing will admit. In case the witnesses be dead, there cannot probably be any express proof, since, at the execution of wills, few are present but the devisor and the witnesses; then, as in other cases, the proof must be circumstantial, and here are circumstances. 1st, Three witnesses have set their names, and it must be intended that they did it regularly. 2d, One witness was an attorney of good character, and may be presumed to understand what ought to be done rather than the contrary; and there may be circumstances to induce a jury to believe, that the witnesses set their hands in the presence of the testatrix, rather than the contrary; and it being a matter of fact, was proper to be left to them. The plaintiff was nonsuited.

§ 34. The same question arose in a subsequent case, on a trial at Bar in ejectment. The defendant made title under a will, the attestation of which was in these words: "Signed, sealed, published, and declared as" and for his last-will, in the presence of us, *A.B.*" &c. The witnesses were all dead, and their hands proved in common form. It was objected, that this was not an execution according to the statute of frauds; and the hands of the witnesses could only stand as to the facts they had subscribed to, and signing in the presence

Croft v.
Pawlet,
2 Strz. 1102.

sence of the testator was not one. But the court, on the authority of *Hands v. James*, said, it was evidence to be left to a jury of a compliance with all the circumstances; and a verdict was given for the will.

The Witnesses may attest at different Times.

§ 35. By the *Roman* law, it was necessary that all the witnesses should be present at the same time, and, some doubts were formerly entertained, whether the presence of all the witnesses at the same time was not required by the statute of frauds; but it is now established, that, although the witnesses attest at different times, yet it is sufficient.

Anon. 2.
Cha. Ca. 199.

§ 36. A will of lands, attested by three witnesses, who at several times subscribed their names at the request of the testator, but were not present at once together, was decreed to be well attested within the statute.

Cook v. Parsons, Prec. in
Cha. 184 S.P.

Jones v.
Lake, 2 Atk.
176 n.

§ 37. In ejectment, a special verdict was found. A testator signed and executed his will in the presence of two witnesses, who attested the same in his presence. Four years after, the testator went over his name with a pen in the presence of a third witness, who subscribed his name in his presence, and at his request. The question was, whether this was a due execution of the will under the statute of frauds. Mr. *Henley* argued for the heir at law, that the statute requiring three witnesses to subscribe in the testator's presence, must intend they should be all present together, else there was not that degree of evidence which the statute required; for an attestation of three witnesses, at different times, had only

only the weight of one witness. Witnesses to a will not only attest the due execution of it, but likewise, the capacity of the testator at the time of execution. A man might be sane at the time when two of the witnesses attest, and insane when the third attests. It could not be considered as a will till the third witness had signed it, for that completed the act. Mr. *Banks* argued on behalf of the devisee, that a will, executed in the presence of three witnesses, though they attested it at different times, was good within the statute of frauds, because that statute does not require that all the witnesses should be present at the same time: the requisites under the statute were, that the testator should sign in the presence of three witnesses at least, and that they should attest in his presence, it would, therefore, be adding new requisites, which the act does not mention, and, in fact, making a new law.

Lord Chief Justice *Lee*.—“ This case depends on
 “ the words of the statute; the requisites in the statute
 “ are, that the three witnesses should attest the signing
 “ of the testator, but it does not direct that the three
 “ witnesses should be all present at the same time.
 “ There has been no determination as to this point.
 “ In the case of *Cook v. Parsons*, the testator’s signing
 “ was held good, though it was not before three wit-
 “ nesses at the same time, and the court only doubted
 “ whether the testator’s barely owning the subscription
 “ to be his before one of the witnesses, was good;
 “ but there was no doubt as to the validity of the will,
 “ from the execution at different times. Here you
 “ have the oaths of three attesting witnesses; this is
 VOL. VI. F “ the

Ante f. .

Vide 1 Ves.
Jun. 14. 16.

“ the degree of evidence required by the statute, and
 “ the same credit is given to three persons at different
 “ times, as at the same time. We cannot carry the
 “ requisites farther than the statute directs ; the act is
 “ silent as to this particular ; it would, therefore, be
 “ making a new requisite. The signing is the same
 “ act reiterated ; the testator, in the principal case,
 “ went over his name again, and declared it to be his
 “ last will.”

Judgment against the heir at law.

Who may be
Witnesses.
1 Burr. Rep.
417.

§ 38. With respect to the persons who are capable of being witnesses to a will, the statute of frauds only mentions the word credible ; and, therefore, all those who are capable of being witnesses in any other matter, may also be witnesses to a will. The Judges were, however, formerly, very strict with regard to the competency of the witnesses to a will, for neither a devisee, legatee, or creditor, was allowed to be a competent witness to a will. This occasioned the statute 25 Geo. 2. c. 6. by which it is enacted, sect. 1. “ That if any
 “ person attest the execution of a will or codicil, to
 “ whom any beneficial devise, legacy, estate, interest,
 “ gift, or appointment, (except charges on land or
 “ hereditaments for payment of debts), is thereby
 “ given or made, such devise, legacy, &c. shall so far
 “ only as concerns such person attesting such will or
 “ codicil, or any person claiming under him, be void ;
 “ and such person shall be admitted as a witness to the
 “ execution of such will or codicil.”

“ Sect. 2.

“ Sect. 2. In case by any will or codicil, any lands
 “ or hereditaments be charged with any debts, and
 “ any creditor, whose debt is so charged, hath attested,
 “ or shall attest the execution of such will or codicil,
 “ every such creditor shall be admitted as a witness to
 “ the execution of such will or codicil.”

“ Sect 6. The credit of every such witness so at-
 “ testing the execution of any will or codicil, and
 “ all circumstances relative thereto, shall be subject
 “ to the consideration of the court, and the jury before
 “ whom such witness is examined, or his testimony or
 “ attestation made use of, or of the court of equity in
 “ which his testimony or attestation is made use of.”

§ 39. Two celebrated cases have been decided re-
 specting the competence and credibility of witnesses to
 a will. The first is that of *Wyndham v. Chetwynd*, in
 the Court of King’s Bench; and the second, is that
 of *Doe on the demise of Hindson v. Kersey*, in the Court
 of Common Pleas; but as they relate to wills made
 before this statute, it is unnecessary to state them.

1 Burr. R.
 414.

§ 40. A legatee may be a witness against a will,
 because he swears against his own interest, and so is
 the strongest evidence.

Oxenden v.
Penrice,
Salk. 691.

§ 41. An infamous person is not a competent witness
 to a will; and, therefore, it was held, in a modern
 case, that a person who had been convicted of stealing
 sheep, was not a competent witness to a will: for it

Pendock v.
Makender,
 4 Burn. Ecc.
 Law, 95.

was the crime that created the infamy, and took away a man's competency, and not the punishment.

Bernett v.
Taylor, 1 Vef.
Jun. N. S.
381.

§ 42. It was held by Lord *Eldon* in a late case, that where one of the witnesses to a codicil had become insane, his handwriting might be proved, as he might be considered as dead.

Publication.

3 Atk. 161.

§ 43. A will must also be published, that is, the testator must do some act from which it can be concluded that he intended the instrument to operate as his will. And Lord *Hardwicke* has mentioned a case where, upon a trial at Bar in the Court of King's Bench, the question was, whether the testator had published his will, for there was no doubt of his executing it in the presence of three witnesses, or their attesting it in his presence; which shewed that publication was, in the eye of the law, an essential part of the execution of a will, and not a mere matter of form.

Peate v.
Ougly,
Com. R. 196.

§ 44. The words, signed and published by the said *A. B.* as and for his last will and testament, are a sufficient publication; and the delivery of a will as a deed, has been held to be a sufficient publication.

Trimmer v.
Jackson,
4 Burn. Ec.
Law, 119.

§ 45. Thus, where a will was delivered by a testator as his act and deed, and the words sealed and delivered were put above the place where the witnesses were to subscribe, it was adjudged, that this was a sufficient publication.

§ 46. It

§ 46. It has been held, that a general charge of legacies made on lands by a will duly attested according to the statute of frauds, extended to legacies afterwards given by a will or codicil, not duly attested; from which, it was concluded, that a person might, by means of a will duly executed, empower himself to make a future disposition of land, by another instrument not duly executed. This doctrine, if established, would have been attended with the most serious consequences; for, as Mr. *Fearne* observes, “ If a man might, by a will duly attested, devise his lands upon such trusts as he should appoint by any other instrument, it would, in effect, amount to a repeal of the statute of frauds in respect to the solemnities of testamentary dispositions of land. A man would have nothing to do but, on his coming of age, to make one general repeal of that statute, in regard to himself, by devising his whole real estate to some nominal persons, and their heirs, upon such trusts, &c. as the testator should afterwards by any writing appoint; and he might, by reference to such repealing will, at any time make a testamentary disposition of the estates, without the least attention to the ceremonies required by the statute. This would let in all the inconveniencies of frauds and perjuries intended to be prevented by the last mentioned statute, in regard to testamentary dispositions of land: nay, the legal abolition might possibly be extended to the statute of wills as well as that of frauds, &c. and by considering the first intermediate will a sufficient compliance, as well with the requisition of writing required by one statute, as of the ceremonies of execution by the other, a

A Person can-
not empower
himself to
give Lands by
a Will not
duly attested.
infra.

Opin. 435.

“ parol appointment of the trusts might be attempted,
 “ under a power worded for that purpose in the ori-
 “ ginal absolving will.”

This opinion has been established as good law by the following determination.

Habergham
 v. Vincent &
 Stansfield,
 5 Term R. 92.
 2 Vef. Jun.
 204.

§ 47. A person seised of freeholds and copyholds which he had surrendered to the use of his will, by a will duly executed and attested, gave certain interests in his estates, and, in default of issue of the persons to whom they were thus given, he gave the same to trustees to such uses as he should declare by any deed or instrument to be executed by him and attested by two or more credible witnesses. The testator, by a deed-poll, dated the day after attested by two witnesses, declared farther uses. A question was referred to the Court of King's Bench, whether the two instruments taken together were, at the time of the death of the devisor, sufficient to pass any estate or interest in the freehold or copyhold premises, or either of them, not given by the first instrument. The Court of King's Bench certified their opinion, that the two instruments, taken together, were not sufficient to pass any estate or interest in the freehold or copyhold premises, or either of them, not given by the first instrument; on the ground, that the second instrument was a deed, and not a will. The cause coming on for farther directions, Lord *Loughborough*, Mr. Justice *Buller*, and Mr. Justice *Wilson*, were clearly of opinion that the second instrument, not being attested according to the statute of frauds, could have no operation upon the freehold estates but was good as to the copyholds. But Mr. Justice

2 Vef. Jun.
 204.

Infra f.

Justice *Wilfen* said he believed it was true, and he had found no case to the contrary, that if a testator in his will referred expressly to any paper already written, and so described it, that there could be no doubt of the identity, and the will was executed in the presence of three witnesses, that paper made part of the will, whether executed or not; and such reference was the same as if he had incorporated it.

§ 48. The statute of frauds requires, that all devises of lands or tenements shall be executed in the manner above stated; and it has been determined, that all devises by which terms for years, or other interests arising out of lands are created, or by which powers to sell or charge land are given, are within the statute. And, therefore, where an estate is devised for a term of years, or a sum of money is given originally and primarily out of land, a will containing such a charge must be executed in the manner prescribed by the statute, because it is the same as a devise of the land, since the term of years is an interest in the land; and money thus given, can only be raised by a sale of the land.

Wills that charge Lands are within the Statute.

2 Atk. 272.
2 Ves. 179.

§ 49. There is one exception to this rule which has been already mentioned, namely, where a will duly executed according to the statute contains a general charge on lands in aid of the personal estate, it will extend to legacies given by a subsequent will, or codicil, not duly attested. This doctrine is founded on the principle, that a charge of debts or legacies amounts to no more than making the real estate auxiliary to the personal, or, in other words, directing it to be

Exception.—
Codicil giving Legacies.
Ante f. 46.

Brudenell v. Boughton,
2 Atk. 268.
1 Burr. R. 423.
Fearne's Op. 434.

converted into, and applied as part of the testator's personal estate, and in aid thereof.

2 Vef. Jun.
231.

§ 50. Mr. Justice *Buller*, in the case of *Habergham v. Vincent* and *Stansfield*, cited in support of this doctrine, the case of the Duke of *Bolton v. Williams*, in which a term was created by a testator for payment of all such legacies as he should mention in a codicil. He made a codicil unattested, giving legacies and annuities, and the annuities were held to be legacies. And the Lord Chancellor observed, that all the cases of this kind were not cases of a primary, substantive, and independent charge upon the real estate, but a charge upon it in aid of the personal, which was primarily charged; and that the statute of frauds did not prevent a man from creating by will, a fluctuating charge upon real, in aid of personal.

Id. 236.
8 Vef. Jun.
495.

Wills of
Trusts are
within the
Statute.

§ 51. Although a trust estate is now, what a use was before the statute 27 *Hen.* 8. yet it is settled, that it can only be devised by a will executed according to the statute of frauds.

Wagstaff v.
Wagstaff,
2 P. Wms. 261.

§ 52. Lands were conveyed to trustees, in trust for *J. S.* his heirs and assigns, or such persons as he or they should appoint. *J. S.* by a will attested by two witnesses only, devised his trust estate to *J. N.* Lord *Macclesfield* said, there could be no question but that a trust of an inheritance could not be devised, otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for, if the law were otherwise, it would introduce the same inconveniencies,

as

as to frauds and perjuries, as were occasioned before the statute by a devise of a legal estate. 3 Atk. 151.

§ 53. An estate in mortgage, though only held as a pledge for securing the repayment of money, can only be devised by a will executed according to the statute of frauds. The same rule applies to equities of redemption, which are considered as real estates.

And of Mortgages and Equities of Redemption.

§ 54. Money directed to be laid out in the purchase of lands, being considered in the Court of Chancery as land, must, I presume, be devised by a will attested according to the statute of frauds.

And of Money to be laid out in Lands. Tit. 1. f. 15.

§ 55. A will made in a foreign country of lands in *England*, must be executed in the same manner, and attested by the same number of witnesses, as if made in *England*.

And Wills made abroad. Coppin v. Coppin, 2 P. Wm. 293.

§ 56. As terms for years already created were devisable before the statute of wills, they are not comprehended within the statute of frauds, and may therefore be devised by a will not executed according to that statute. But it has already been observed, that a term *de novo* cannot be created by will, unless such will is executed according to the statute of frauds.

Wills of Terms for Years not within the Statute.

Ante f. 48.

§ 57. If, however, a term for years be assigned to attend the inheritance, it then becomes a part of the inheritance, and not a chattel real, and can only be devised by such a will as would pass the inheritance.

Exception.—Terms to attend.

Whitchurch
v. Whit-
church,
2 P.Wm 236.
9 Mod. 124.

§ 58. *Edward Whitchurch* took a mortgage for 500 years, to commence from the making thereof, for securing 200*l.* and afterwards took another security of the same lands for 1000 years, in the name of another person, in trust for himself, to commence also from the making thereof. *Edward Whitchurch* afterwards purchased the inheritance in his own name, and, by a will not executed according to the statute of frauds, he devised the premises to the son of a younger brother. The heir at law of the testator brought her bill in Chancery, in order to compel the executor and devisee to assign over the term to her. It was objected for the defendants, that the executor had assented to the devise; and that the will, though not attested by three witnesses, was, however, good at law, to pass the term. But decreed, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor, in which respect, it was to be considered as part of the inheritance; so the will, which was not attested by three witnesses, as the law required it to be, when land was to pass, should not carry this term. Though it was true such a will, as in the present case, would be sufficient to pass a term in gross, yet should it not pass the trust of a term attendant on an inheritance, nor, consequently, the term itself.

2 Atk. 72.

Wills of
Copyholds
not within
the Statute.

Ch. 4.

§ 59. It has been stated, that the statutes of wills do not extend to copyhold estates, and that the power of devising them is indirectly exercised by means of a surrender to the use of a will; and it has been determined, that in such cases, a will need not be executed according

according to the statute of frauds, because the copyhold passes by the surrender, and not by the will; which is only a declaration of the uses of the surrender. And even a nuncupative will of copyholds was an effectual declaration of the uses, where the surrender was silent as to the form, till the 29 *Cha.* 2. required all declarations of trusts to be in writing.

1 Inst. 111 b.
n. 3.

§ 60. Lord *Macclesfield* has observed upon this doctrine, that his opinion was never to shake any settled resolutions touching property or the title of land, it being for the common good, that these should be certain and known, however ill-grounded the first resolution should be; but if that had not been settled, it might be more reasonable to say, when I have surrendered my copyhold to the use of my will, a will of this copyhold shall be so executed, and in such a manner as by the act of parliament a will of lands ought to be executed: but this case having been ruled otherwise, he could not shake it; however, he was not for carrying it one jot farther.

2 P.Wm. 258.

§ 61. In a modern case, Lord *Kenyon*, when Master of the Rolls, determined, that a mere draught of a will, the signing and publication whereof were prevented by the testator's sudden death, yet, being proved in the ecclesiastical court, as a testamentary paper, was sufficient to pass copyholds, which the testator had before surrendered to the use of his will.

Cury v.
Askew, cited
2 P.Wm. 259.
n. 1.

§ 62. Mr. *Peere Williams* states it to have been laid down by Sir *Joseph Jekyll*, that if a copyholder be

2 P.Wm. 261.

seised only of the trust, or equity of redemption of a copyhold, and devises such trust or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will, to pass this trust, and the trust and equity of redemption of all lands of inheritance are within the statute of frauds and perjuries; otherwise great inconveniencies would arise therefrom. But, in a subsequent case, Lord *Hardwicke* was of opinion, that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do, for that equity ought to follow the law, and make it at least as easy to convey a trust, as a legal estate.

Tuffnell v.
Page, 2 *Atk.*
37.

Goodwin v.
Kilshaw,
Amb. 684.

§ 63. If the surrender of a copyhold to the uses of a will requires that the will should be attested by three witnesses, a devise of such copyhold must be so attested, otherwise it will be void.

Huffey v.
Grills, *Amb.*
299.

§ 64. A devise of customary freeholds, where there is no custom to surrender them to the use of a will, must be executed according to the statute of frauds; and a trust estate in them must be devised in the same manner.

Wills may be
proved in
Chancery.
Colton v.
Wilson,
3 *P.Wm.* 192.

§ 65. It has been a common practice for a long time, where a title depends upon a will, to prove it in Chancery; but Lord *King* has said, that this is not absolutely necessary to make out the title, any more than it would be to prove a deed in equity, by which the estate was settled from the heir at law, after the ancestor's

ancestor's death. The will prevents and breaks the descent to the heir, as much as a deed; and the hands of the witnesses to the will may be as well proved as those to a deed. Now, as it would be no objection to a title, if a modern deed, on which the title depended, was not proved in equity, why should it be so in the case of a will, where the same appears to be duly attested by three witnesses, whose names are mentioned to have been subscribed in the presence of the testator?

Fearne's Op.
234.

TITLE XXXVIII.

DEVISE.

CHAP. VI.

Of the Revocation of Devises.

- | | |
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| <p>§ 1. <i>All Devises are revocable.</i>
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 4. <i>A subsequent Will.</i>
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 86. <i>Unless it extends to other Things.</i>
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Section I.

All Devises
are revocable.

ALTHOUGH a devise of lands differs in many respects from a testament of personal property, yet there are some circumstances common to both;
one

one of which is that a devise is revocable at any time during the life of the devisor. So that although a person should declare his will to be irrevocable in the strongest terms, yet he may revoke it, because his own acts or words cannot alter the disposition of the law, so as to make that irrevocable which in its own nature is revocable.

8 Rep. 82 a.
Bac. Max. 19.

§ 2. Devises of lands, made in pursuance of the particular customs of boroughs, or by virtue of the statutes of wills might have been revoked by words only without writing, the statute of wills giving power to any person seised in fee of lands to devise them by writing, but being silent as to revocations. This was remedied by the sixth section of the statute of frauds, by which it is enacted, “ That no devise in writing, of
 “ any lands, tenements, or hereditaments, or any
 “ clause thereof, shall be revocable otherwise than by
 “ some other will or codicil in writing, or other writ-
 “ ing declaring the same, or by burning, cancelling,
 “ tearing, or obliterating the same by the testator
 “ himself, or in his presence and by his directions and
 “ consent. But all devises and bequests of lands and
 “ tenements shall remain and continue in force until
 “ the same be burnt, cancelled, torn, or obliterated,
 “ by the testator or his directions in manner aforesaid,
 “ or unless the same be altered by some other will or
 “ codicil in writing, or other writing of the devisor,
 “ signed in the presence of three or four witnesses
 “ declaring the same.”

Statute of
Frauds.

§ 3. There

Modes of
revoking a
Will of Lands.

§ 3. There are therefore three exprefs modes of revoking a will. First by a subsequent will duly attested according to the statute. Secondly, by an exprefs declaration in writing that the testator means to revoke his will. And thirdly, by cancelling, tearing, or obliterating it.

A subsequent
Will.

Just. Inst.
Lib. 2. Tit.
17. f. 2.

Vinn. Com.

Cowp. R. 90.

§ 4. With respect to the first mode it should be observed that, by the *Roman* law, a subsequent will operated in all cases as a revocation of the former one. *Posteriori quoque testamento quod jure perfectum est, superius rumpitur.* The reason of this rule was, because the essence of a *Roman* testament consisted in the institution of an heir who took the whole property of the testator, so that two wills could never subsist at the same time, as there could not be two distinct owners of the same thing. *Quicumque testamentum facit censetur de omnibus bonis disponere, ut non magis duo testamenta simul consistere possint, quam duo domini ejusdem rei in solidum constitui.* But although the law of *England* has adopted the principles of the *Roman* law respecting wills of personal property, yet Lord *Mansfield* has said that a devise of lands is looked upon in a very different light, being considered as an appointment of particular lands to a particular devisee, and is considered in the nature of a conveyance by way of appointment, and upon that principle it is that no man can devise lands which he has not at the time of such conveyance; from which it follows that a man may as well dispose of part of his lands, by his will, as of the whole.

§ 5. In consequence of these principles it may be laid down as a rule, that although a subsequent will duly attested is generally said to be a revocation of a former one, yet this proposition must not be adopted in its utmost extent; for a subsequent will of lands is not in its own nature a revocation of a former one, nor will it operate as such, unless it contains words expressly revoking the former one, or makes a different and incompatible disposition of the same lands; so that if a second will has not a clause of revocation of all former wills, and does not make any disposition inconsistent with a former will, it cannot operate as a revocation of such former will, but both wills are good.

A subsequent Will not always a Revocation.

3 Will. R.
511.

§ 6. A person devised lands to his younger son and his heirs. He afterwards married, and by another will in writing, devised the same lands to his wife for life, paying yearly to his younger son and his heirs, a certain rent. *Anderson* and *Glanville* held it to be no revocation, but that both wills might stand together, the latter not being contrary to the former, and there being no express revocation. The intention of the testator being only to provide for his wife, and not to alter the devise to his son, for the giving him a rent shewed he intended that he should take the reversion.

Coward v.
Marshall,
Cro. Eliz. 721.

§ 7. Where a jury found that a testator had made a second will, the contents of which were unknown, such second will was held not to operate as a revocation of the first; because it did not appear, either that

it contained a clause revoking the former will, or that it made a different disposition of the same lands.

Hungerford
v. Nofworthy,
Show. Parl.
Ca. 146.
Hard. 374.
Salk. 592.
3 Mod. 203.
Hitchins v.
Bassett.

§ 8. In ejectment the jury found a special verdict that Sir *Henry Killigrew* being seised in fee made his will in writing, and that afterwards he made another will in writing, but as to the contents thereof they were entirely ignorant. The question was, whether the second will could operate as revocation of the first. The Court of King's Bench was of opinion that the second will was not a revocation of the first.

Upon a writ of error in the House of Lords, it was argued for the plaintiff, that the second will could not be considered as a duplicate of the first, but must be deemed a revocation of it; that no will was good but the last; that every will was revokable until death; that the making another will imported a revocation of all former ones, even though it was not so expressly declared.

On behalf of the defendant it was contended that every latter will was not a revocation, for a man might dispose of one part of his estate by one will, and of another part by another will. So if a man purchased lands after he had made his will, he might make another will of those. Therefore the second will in this case might relate to other lands and be no revocation. The judgment was affirmed.

§ 9. In a modern case the judges carried this principle still farther; for where a jury found that a
5*
testator

testator had made a second will different from the first, but without finding in what that difference consisted, they held that such second will did not revoke the former one.

§ 10. It was found by a jury that *John Lacey* being seised in fee simple of a set of chambers in *Lincoln's Inn*, made a will in the year 1748, by which he devised all his real and personal estate to *Frances Harwood*. And that in the year 1756 he made another will different from the former one, but in what particulars were unknown to them. But they did not find that the testator cancelled his said will of the year 1756, or that the defendant destroyed the same; but what was become of the said will the jurors were altogether ignorant.

Goodright v.
Harwood,
3 Will. R.
497.
2 Black. R.
937.
Cowp. R. 87.
7 Bro. Parl.
Ca 489.

The question was, whether the devise in the will of 1748 to *Frances Harwood*, was revoked by the will found to be executed in 1756.

Judgment was given in the Court of Common Pleas, that the will of 1748 was revoked by the second will; but, upon a writ of error in the Court of King's Bench, this judgment was reversed.

A writ of error having been brought in the House of Lords, it was contended on the part of the plaintiffs in error, that the title of the heir at law, being a clear substantive title, ought not to be defeated but by a title equally clear and unexceptionable: that the title of a devisee must be founded on that, which is

clearly known to be the *ultimate* intention of the testator, and it was not sufficient that the testator did at one time of his life mean to give his estate to the devisee, unless he continued in that intention to the time of his death. The jury had found, that the testator had made a second will, executed according to law ; and that the disposition, made by the testator in his second will, was different from the disposition in his first will : and, though the jury said they were unable to ascertain the particulars, yet the finding necessarily imported, that they had received sufficient satisfaction, as to the general contents, to enable them upon their oaths to find that. From whence the court must see that the testator's intention was generally changed ; and, consequently, that the first will was revoked. That the jury, having found that Mr. *Lacey* did in 1756 duly execute another will, the same must be taken to subsist at the time of his death, unless a subsequent change of intention appeared ; but the jury had excluded the idea of any such change by declaring, they did not find that the testator had cancelled the second will ; and, as the jury had not found it cancelled, the court could not say it was so. By establishing then the first will, which the testator did not mean to die with, it would necessarily follow, that the whole of the testator's large fortune would go from his family to a person, for whom from the year 1756 he never intended it. Wills, disinheriting natural heirs in favour of persons who are strangers in blood, ought not to receive more countenance, than the necessity of the occasion requires ; and, whenever there is evidence of a change of intention in the tes-

tator, such wills can never be established to the prejudice of an heir at law. That, it being at least rendered doubtful by the execution of the second will, whether Mrs. *Harwood* was entitled to any thing, or if she was, *what* she was entitled to, it became necessary for her as claiming under a derivative, and not under an original title, to produce the second will and shew her interest under it. That if ever it should be understood as established in law, that from the bare non-production of a latter will, to whatever cause it might be owing, a former will must at all events be established, it would be an opening to frauds of the most dangerous kind, and be the strongest temptation to devisees in a former will, to exert every artifice to get possession of and suppress the latter instrument, in order to set up the former revoked will.

On the other side it was said that, with regard to the doctrine of revocations, the determination of the House of Lords in the case of *Hitchins v. Bassett* had Ante f. 8. settled this point at law, *viz.* that a subsequent independent will of lands is not, in its own nature, a revocation of a former will, nor will operate as such; unless it contains words expressly revoking the former, or makes a different and incompatible disposition of the same lands. In the present case the last will was not to be found; its contents were not known; therefore no express revocation of the former will appeared in it, nor could it be shewn that it contained any different or incompatible disposition of the chambers in question. That, although it was found by the verdict that the disposition, made by the latter will, was

different from that made by the former, yet it was at the same time found to be unknown, in what particulars that difference consisted; whether it related to lands, or to personal estates only, to the appointment of an executor, or to the quantum of a legacy. The most trivial alteration in the most inconsiderable legacy might have occasioned that difference; but there was nothing to prove that it extended to those particular chambers, which were the subject of the question. The mere existence of a subsequent will was not, of itself a revocation, nor was any new disposition, contained therein, a revocation of the former devise of the chambers in question; unless that new disposition affected those very chambers. And therefore, until it could be shewn, that the different disposition found by the verdict extended to those chambers, or that there were express words of revocation of the former will contained in the latter, the devise under which the defendant claimed, stood unrevoked by any thing which could be shewn,

It was objected, that the claim of a devisee must be founded on the *last* will of the testator; and that, in this case, there being found to be a will executed subsequent to that in 1748, that in 1748 was not the last will of the testator, and consequently none could claim any lands under it. But to this it was answered, that the proposition, that the claim of the devisee must be founded on the last will of the testator, was fallacious; unless its import was very strictly attended to. It was true, the will under which a devisee claims must be the *last* will, in respect to the very lands
which

which were the subject of such claim; but, if there were ten subsequent wills, which contained no express revocation of the former will, nor any words which could affect, or extend to, the subject matter of a devise, contained in a former will, that former will, *quoad* the subject of such devise, would be the last will of the testator. It was lastly observed, that should a will, which could not be produced, and the contents or effects whereof were entirely unknown, be construed as a revocation of a known subsisting will, such a construction would in effect not only overturn the statute of frauds, in respect to one of the most material and dangerous species of fraud, intended to be provided against by that statute; but would at the same time be striking a most fatal blow, at the very root of all testamentary power over lands; for, of what use to a man would the power of making a will be, if he could not make that will secure? But it was impossible that any will, however deliberately made and solemnly executed, could be in any degree secure; if it could be set aside by means so very practicable, as only swearing to the execution of an unexisting will.

After hearing counsel on this writ of error, the following question was put to the Judges, *viz.* “Whether on the facts found by the special verdict in this cause, the devise of the chambers, in *Lincoln’s Inn*, to *Frances Harwood*, the defendant in error, by the will of the 16th April 1748, be revoked or not?” Whereupon the Lord Chief Baron of the Court of Exchequer delivered the unanimous opinion of the judges, that the said devise was not

revoked. It was therefore ordered and adjudged, that the judgment given in the Court of King's Bench, reversing the judgment given in the Court of Common Pleas, should be reversed.

§ 11. The intention of a testator to revoke a will is the circumstance which constitutes the revocation, and when that appears in a subsequent will, it is sufficient, though such subsequent will should not take effect from the disability of the devisee.

1 Roll. Ab.
514.

§ 12. Thus where a person devised lands to *A. B.* and afterwards devised it to the poor of the parish of *C.* which was void, they not having a capacity to take, yet it was held to be a revocation. So a devise to a corporation, though void, was held to be a revocation.

Roper v.
Ratcliffe,
10 Mod. 233.

§ 13. In a subsequent case it was held that a devise to a Roman Catholic (who was then incapable of taking by devise) should notwithstanding operate as a revocation of a former will.

A Codicil is
sometimes a
Revocation.
3 Atk. 532.
1 Ves. 32.
178.

§ 14. A codicil duly executed has the same effect in revoking a former devise as a subsequent will; if it contains express words of revocation; or if it makes a different disposition from that contained in the will.

Two Wills of
the same Date
are void.
Phipps v. Earl
of Anglesea,
7 Bro. Par.
Ca. 443.

§ 15. It was held by all the Judges in the House of Lords that two inconsistent wills of the same date, neither of which could be proved to be last executed, were by the common law of *England* void for uncertainty.

tainty, so far as they were inconsistent and would let in the heir, if no act of the testator subsequent to the wills explained them, so as to reconcile what otherwise would appear inconsistent.

§ 16. The second mode of revoking a will is by a writing declaring an intention of revoking such will, signed in the presence of three witnesses. And it is observable that the statute of frauds (§ 5.) requires that in devises of lands, the three witnesses should subscribe the will in the presence of the testator. But the clause relating to revocation (§ 6.) only requires that the devisor should sign in the presence of three witnesses without requiring that the witnesses should subscribe in the testator's presence.

A written
Declaration.

1 P. Wms.
344.

§ 17. Upon the construction of this clause it has been held that although a will may be revoked by a written declaration, without being attested by three witnesses, in the presence of the testator; yet that a second will, though containing a clause revoking all former wills, shall not operate as a revocation, unless it is executed in such a manner as to operate as a devise.

§ 18. *J. S.* by a will executed according to the statute, devised the lands in question to *A.* afterwards the testator published another writing as his last will, in the presence of three witnesses, revoking all former wills; but the witnesses to the second will did not subscribe their names in the presence of the testator. The second will not being valid as a devise of lands, the question was, whether it was not a good writing within the

Egglestone v.
Speake,
3 Mod. 258.
1 Show. 89.

the statute of frauds to revoke the first will. And the court resolved that it was not.

Onions v.
Tyrer,
1 P. Wms.
343.
2 Vern. 741.

§ 19. A person by a will duly attested, devised lands to trustees to several uses. He afterwards made another will of the same lands devising them to other trustees, but to the same uses, and there was a clause in this last will revoking all former wills; but though it was subscribed by the testator and attested by three witnesses, yet the witnesses did not subscribe their names in the presence of the testator, upon which the testator's heir claimed the lands. And the question was, whether the last will being void as a devise of the lands, should yet be a good revocation of the former will. Lord *Cowper* declared, that if the testator had by his second will barely revoked the first, without declaring by the same act his intention to dispose of his lands to the same purposes to which they were devised by the former will, the second will had been a good revocation of the former, as to the lands devised; but here was a disposition of the same lands in the second will to the same purposes as in the first will, which shewed he did not mean to revoke his first will as to the devise of those lands, unless he might by the second will (at the same time that he revoked the former) set up the like devise, so as to take effect by virtue of his second will; and that his second will never being so perfected as to make the devise of the lands therein to be good, the same devise stood unrevo-
ked by the former will. And that upon the like reason the courts of law had determined with great justice in the cases cited. And it was plain the testator
did

did not mean to revoke his former will by cancel-
ling, but by substituting another perfect will in lieu thereof. Vide infra.

§ 20. In the case of *Ellis v. Smith*, one of the questions was, whether the will not being signed by the testator in the presence of the witnesses but only acknowledged, was a good revocation under the 6th section of the statute. The Lord Ch. Baron *Parker* thought it was, and that a revocation might be by any will executed according to the 5th section of the statute: For the words, “Signed in the presence of “three witnesses,” &c. related only to the preceding words, “any other writing.” The clause was to be construed in the disjunctive, *viz.* either by will, codicil, &c. or by writing signed before three witnesses. The other judges were of the same opinion. Ante ch. 5.
1 Ves Jun.
12.

§ 21. A declaration by a testator that he has revoked a particular devise in his will, though reduced into writing, and attested by three witnesses, will not operate as a revocation unless signed by the testator. Such Declaration must be signed by the Testator.

§ 22. A person devised certain estates to his daughters, *D.* and *S.* afterwards the testator having an intention to revoke the will, as to *D.*, directed the following words to be written on his will—“We whose “names are underwritten do testify that the above “named *A.* (the testator) did the day of the date “hereof publish and declare that the several clauses “and devises in his will, any way relating to his “daughter *D.* should cease and be void, she being “since Hilton v.
King,
3 Lev. 86.

“ since married, and her portion paid ; in witness
 “ whereof we have hereunto set our hands, &c.”
 And the same was subscribed by four witnesses in the
 presence of the testator ; but the testator did not sign
 the same, nor any other person by his direction, or by
 him authorized. Adjudged that this was not a re-
 vocation.

Cancelling.

Cowp. R. 52.

§ 23. The third mode of revoking a will is by
 cancelling it, that is by tearing, burning, or otherwise
 destroying it, or by obliterating it, or defacing the
 signature of the testator. But Lord *Mansfield* has ob-
 served, that cancelling is in itself an equivocal act,
 and in order to make it a revocation, it must be shewn
quo animo it was cancelled ; for unless that appears it
 will be no revocation. As if a man were to throw
 the ink upon his will instead of the sand, though it
 might be a complete defacing of the instrument, it
 would be no cancelling. Or suppose a man having
 two wills of different dates by him, should direct the
 former to be cancelled, and through mistake the per-
 son should cancel the latter, such an act would be no
 revocation of the last will : or suppose a man having
 a will consisting of two parts, throws one uninten-
 tionally into the fire, where it is burnt, it would be no
 revocation of the devises contained in such part. It
 is the intention therefore that must govern in such
 cases.

Hyde v.
 Hyde,
 1 Ab. Eq.
 409.

§ 24. A person made a will, and intending to
 make some alterations in it, sent for a scrivener and
 gave directions for another will. The scrivener ac-
 cordingly

cordingly drew a draft of another will, which the testator signed, and then, thinking he had made a new will, he pulled out the first will and tore the seals from the first eight sheets of it, which the scrivener seeing asked him what he was doing, to which he answered, I am cancelling my first will. Pray, says the scrivener, hold your hand, the other will is not perfected, it will not pass your real estate, for want of being executed pursuant to the statute of frauds. I am sorry for that, says he, and immediately desisted from tearing off the seals, and died in a short time after without having done any thing farther to perfect the second will, or to cancel the first. It was decreed that the tearing the seals from the first eight sheets, not being done *animo cancellandi*, was no revocation. And that the seal remaining whole to the last sheet, was sufficient, and in strictness it was not necessary that all the sheets should be sealed.

§ 25. In the case of *Onyons v. Tyrer* as reported in *Prec. in Cha.* 459. it is stated that the testator cancelled the first will, by tearing off the seal, and as to this point Mr. Coxe has stated from the register's book what Lord Cowper said, which I shall transcribe.—“ And
 “ it is plain the testator did not mean to revoke
 “ his former will by cancelling, but by substituting
 “ another perfect will in lieu thereof and not other-
 “ wise; and therefore the cancelling thereof was but
 “ a circumstance shewing that he thought he had
 “ made a good disposition by the second will, and in
 “ confidence thereof it was done with no other intent
 “ but that the second will should thereby more surely
 “ take

1 P. Wms.
344 n. 1.

“take place.”—It was decreed that the first will was not revoked.

It must be by the Testator or by his Direction.

§ 26. A will can only be cancelled by the testator himself, or by some other person in his presence, and by his express direction. So that if a stranger tears a will in pieces, it will not be thereby revoked.

Haines v. Haines,
2 Vern. 441.

§ 27. A person having disinherited his heir at law, by will, a younger brother of the heir at law snatched the will out of the hands of the executor, and tore it into many small pieces. Most of the pieces, particularly such parts wherein was the devise of the land, were picked up and stitched together again. A bill was filed to have the will established, and it was decreed that the devisee should hold and enjoy against the heir; and he to convey to the devisee, although there was no direct proof that the heir directed the tearing of the will.

An Intention to cancel is sufficient.

§ 28. Any act of a testator by which he shews his intention to cancel his will, though the will be not actually cancelled, operates as a revocation.

Bibb v. Thomas,
2 Black. R.
1043.

§ 29. One *Patin* who had for two months together frequently declared himself discontented with his will, being one day in bed near the fire, ordered *Mary Wilson* who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as nearly to tear a bit off, then rumbled it together and

and threw it on the fire, but it fell off. However it must soon have been burnt had not *Mary Wilson* taken it up and put it into her pocket. *Patin* did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. He at several times after said that was not, and should not be his will, and bid her destroy it. She said at first, so I will when you have made another; but afterwards upon his repeated enquiries she told him she had destroyed it; though in fact it was never destroyed, and she believed, he imagined it was so. She asked him, when the will was burnt, to whom his estate would go, he answered to his sister and her children. He afterwards told one *J. E.* that he had destroyed his will, and should make no other till he had seen his brother *John Mills*, and desired *J. E.* would tell him so, and that he wanted to see him. He afterwards wrote to *Mills* in these terms,—

“ Dear brother, I have destroyed my will which I made; for upon serious consideration I was not easy in my mind about that will.”—Afterwards desires him to come down—“ For if I die intestate it will cause uneasiness.” He however died without making any other will. The jury, with whom the judge concurred, thought this a sufficient revocation of the will, and therefore found a verdict for the lessee of the heir. A motion was made for a new trial. “ And *per totam curiam*, this is a sufficient revocation. A revocation under the statute may be effected either by framing a new will, amounting to a revocation of the first, or by some act done to the instrument or will itself, *viz.* burning, tearing, cancelling, or

“ obliteration

Onyons v.
Tryers, ante.
Hide v. Hide,
ante.

“ obliteration by the testator, or in his presence, and
 “ by his directions and consent. But these must be
 “ done *animo revocandi*. Each must accompany the
 “ other. Revocation is an act of the mind, which
 “ must be demonstrated by some outward and visible
 “ sign or symbol of revocation. The statute has
 “ specified four of these; and if these or one of
 “ them are performed in the slightest manner, this
 “ joined with the declared intent will be a good revo-
 “ cation. It is not necessary that the will or instru-
 “ ment itself, be totally destroyed or consumed,
 “ burnt or torn to pieces. The present case falls
 “ within two of the specific acts described by the
 “ statute. It is both a burning and a tearing.
 “ Throwing it on the fire with an intent to burn,
 “ though it is only very slightly singed and falls off is
 “ sufficient within the statute.”

The rule for a new trial was discharged.

An Obliteration of Part does not revoke the Whole.

§ 30. An obliteration or alteration of part of a will does not operate as a revocation of the whole, but only *pro tanto*.

§ 31. *A.* by will in writing duly attested, devised to his wife a copyhold estate. *A.* on the day he died, directed *B.* to obliterate some devises, but nothing as to the copyhold; and then caused a memorandum to be wrote, that he had examined and approved of the will as so obliterated and altered in his presence by *B.* but did not republish it in the presence of three witnesses,

nesses, but directed *B.* to carry it to one to write it fair, and, before it was brought back, he became delirious.

Held to be a good will.

§ 32. *Robert Sutton* made his will duly attested, and thereby gave all his estates, except a house at *Bath*, to trustees, in trust to sell, and to place out the money on Government or real securities, for the purposes therein mentioned. The testator afterwards made several alterations, obliterations, and interlineations, in different parts of his will, which were not attested, but did not erase or alter the devise to the trustees. It was certified by the Court of King's Bench, upon a case sent out of Chancery, that the devise of the real estate to the trustees was not revoked.

Sutton v. Sutton,
Cowp.R.812.

§ 33. A person devised a real estate to three trustees and their heirs, upon trust to sell. Some time after, the testator struck out the name of one of the trustees, by drawing a pen through it. And the question was, whether the devise to the trustees was revoked by the erasure of the name of one of them, after the execution of the will. Upon a case sent out of Chancery for the opinion of the Court of Common Pleas, Lord *Alvanley* said, that a revocation by obliteration will have the same effect which a revocation by any other means will have, and no more. That the devisees must be considered, in a court of law, as joint-tenants in fee, absolutely. That it was argued that the revocation of the devise, as to one devisee, made an alteration in the interest of the others; but,

Larkins v. Larkins, 3
Bos. & Pull.
16.

whatever this alteration was, it was not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If, therefore, the devisees had been tenants in common, upon the erasure of one name, the remaining two would take no more than two-thirds of the estate.

Id. 109.

The court certified, that the devise of the estate to the two trustees, to whom, together with the third trustee, the said estate was devised as joint-tenants in trust to be sold, was not revoked by the testator's having struck out the name of the third trustee after the execution of the said will.

Short v.
Smith, 4 East.
R. 419.

§ 34. *Thomas Carwardine* duly made his will, by which he devised the premises in question to *John Spillman* and *Edward Aldridge*, upon several trusts. The testator, afterwards, made several alterations in the will, and, among others, struck out the name of *John Spillman*, and introduced the names of *James Wood* and *John Adey*, and did not afterwards republish his will.

Lord *Ellenborough* Chief Justice.—“ It has been contended in this case, that the testator *Thomas Carwardine* has died intestate as to the premises in question, and that his heir at law is entitled to recover; inasmuch, as the obliteration of the name of *John Spillman*, one of the devisees in trust, must have been taken to have been done *animo revocandi*; and is a revocation of the devise made of the premises; and

“ and that it must be also taken, that his intention
 “ was to have another will, accompanied with the so-
 “ lemnities required by the statute of frauds, or at
 “ least, to have republished the will, obliterated and
 “ altered as it is, on which the question arises. And
 “ the case in *Dyer* 310 *b.* has been relied on. The
 “ facts of this case plainly shew, that the testator had
 “ no object but to change his trustees: and it would
 “ be unreasonable, when he has not, by any thing he
 “ has done, indicated any intention to dispose of his
 “ lands to different purposes than those declared by his
 “ will, and, when it clearly appears that he meant to
 “ disinherit his heir at law, to infer, that he designed
 “ that his will should become inoperative, and so let
 “ in his heir at law by what he did, rather than to
 “ conclude, that he thought he had, by the alterations
 “ introduced, made a valid disposition of his estate to
 “ the new trustees, and that he had no design to alter
 “ his will, except so far as such obliteration and inter-
 “ lineation could effectuate that purpose, by substitut-
 “ ing the persons whose names he interlined in the
 “ stead of him whose name was struck out. If such
 “ be the case, and so it appears to us, the testator
 “ meant no revocation but by means of that, which
 “ he, through mistake, supposed to be a valid disposi-
 “ tion to others, and had no intention to revoke by
 “ the obliteration he has made, but, by an effectual
 “ substitution, meant to be made of others in the room
 “ of him, whose name was so obliterated; and, if so,
 “ this case must be governed by that of *Onions v.*
 “ *Tyrer*, 1 *P. Wms.* 343. where the intention of the
 “ testator not being “ to revoke his first will by can-

“ celling, but by substituting another perfect will in
 “ lieu thereof.” Lord Chancellor *Cowper*, on the
 “ same ground, set up a like devise, and held a can-
 “ cellation of the first will to be no revocation. But,
 “ in this case, it has been further argued for the de-
 “ fendants, that, supposing the obliteration of the
 “ name of *Spillman* to have revoked the devise to him,
 “ the heir at law cannot recover; inasmuch, as the
 “ devise to *Aldridge* remained unrevoked: and we
 “ think there is great weight in this argument; and
 “ that there are grounds on which it may be con-
 “ tended, that the effect of the obliteration in this case
 “ is, at most, to revoke only the devise as to *Spillman*,
 “ the one devisee in trust whose name is so obliterated,
 “ leaving it unrevoked as to *Aldridge*; the interline-
 “ ations, which were intended to add other trustees,
 “ being, for want of a proper publication, inoperative:
 “ and, therefore, giving its full effect to that obliteration,
 “ it would leave the devise to *Aldridge* in full
 “ force, and competent to sustain all the trusts of the
 “ will in exclusion of the heir at law.”

Cancelling
 one Part re-
 vokes the
 other.
 2 Vern. 742.
 1 P.Wm. 346.
 Burtonshaw
 v. Gilbert,
 infra.

§ 35. Where there are duplicates of a will, and the testator cancels that one which is in his own possession, though the other parts remain entire, yet it will be a revocation of the whole. For the original and duplicate being but one will, they must stand or fall together. And it may not be in the testator's power to get possession of the duplicate.

Implied Re-
 vocations.

§ 36. Besides the different modes of revoking a will allowed by the statute of frauds, certain alterations in
 the

the situation of the testator, or in the estate devised, have been held to be implied revocations of a will.

§ 37. It is now fully established, that a subsequent marriage, and the birth of a child, operate as an implied revocation of a will made during celibacy.

Marriage and
Birth of a
Child.

§ 38. Thus, where a person made a will in the time of a former wife, who died without issue, and married a second wife, by whom he had issue the plaintiff; the Court of Exchequer declared, that the testator's second marriage, and, having issue by that marriage, was a total revocation of the will.

Christopher
v. Christopher
4 Burr. 2182.

§ 39. A person made a will in *Jamaica* in the year 1764, by which he devised his real and personal estate to the defendant: afterwards, he made another will in *England*, which was not duly attested, by which he devised his real and personal estate to his wife, in trust for his son. The Chancellor of *Jamaica* decreed, that the marriage and birth of a child, and the second will, amounted to a revocation, as to the personalty, but not as to the real estate.

Spragge v.
Stone,
Doug. 35.
Amb. 721.

On an appeal to the Privy Council, *Parker* Chief Baron, *De Grey* Chief Justice, and Sir *Eardley Wilmot* being present, so much of the decree as established the first will, with respect to the real estate, was reversed. And it was declared, that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the first will.

§ 40. Marriage and the birth of a child do not, however, in all cases, amount to an implied revocation of a will; for these facts only afford a presumption, that the testator had changed his intention. So that, where this presumption is rebutted by other circumstances, the rule will not hold.

Brown v.
Thompson,
1 Ab. Eq. 413.

§ 41. A bachelor made his will, by which he gave a legacy of 500 *l.* to his brother, and legacies to other persons, and devised his real estate to *Eliza Close* and her heirs. The testator, afterwards, married *Eliza Close*, and died, leaving her pregnant of a son, without altering his will. The question was, whether this alteration in the testator's situation amounted to a revocation of his will.

Wid. Doe v.
Lancashire,
infra.

Lord Keeper *Wright* was clearly of opinion, that an alteration of circumstances might amount to a revocation of a will of lands, as well as of personal estate, notwithstanding the statute of frauds, which does not extend to an implied revocation. But that no such alteration appeared here, for no injury was done to any person, and those were provided for, whom the testator was most bound to provide for, and so established the will.

Brady v.
Lubitt,
Doug. 31.

§ 42. Lord *Mansfield* has said, that as marriage and the birth of a child only amount to an implied revocation of a former will, these may be rebutted by every sort of evidence: and that there was no case in which a marriage and the birth of a child had been held

to

to raise an implied revocation, where there had not been a disposition of the whole estate.

§ 43. It was held, in a modern case, that a second marriage, and the birth of children, the wife and children being provided for by settlement, and there being children of a former marriage, was a case of exception from the rule, that marriage and the birth of a child revoke a will.

Ex parte
Lord Ilchester, 7 Ves.
Jun. 348.

§ 44. It has been determined, in a modern case, that marriage, and the birth of a posthumous child, operated as a revocation of a will of lands, made before marriage.

Marriage and
Birth of a
posthumous
Child.

§ 45. Thus, where a person being a bachelor, devised lands to his nephew, and afterwards married. Upon his wife's becoming pregnant, he expressed an intention to revoke his will, and gave directions to an attorney to prepare another will, but died before it was ready. After his death, his widow was delivered of a child, who brought an ejectment against the devisees.

Doe v. Lan-
cashire,
5 Term R. 49.

Lord *Kenyon* said, it had been solemnly decided, that marriage, and the subsequent birth of a child, amounted to a revocation of a will made before the marriage. Perhaps the foundation of that principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as, a tacit condition annexed to the will itself, at the time of making it, that the party did not then intend that it should take

effect, if there should be a total change in the situation of his family. His Lordship cited a passage from *Justinian's Institutes*, and also from *Vinius's Comment*, to shew that, by the civil law, if the wife was pregnant, and a posthumous child was afterwards born, the will was utterly destroyed: and this confirmed the idea, that these decisions did not proceed on the intention of the party, but on a tacit condition annexed to the will itself when made. That our law also took notice of posthumous children. For these reasons, therefore, standing on former decisions, and not extending them beyond the rule established and incorporated into our law, he was of opinion for the plaintiff: but disclaimed paying any attention to the declarations of the husband; because, letting in that kind of evidence, would be in direct opposition to the statute of frauds, which was passed in order to prevent any thing depending either on the mistake or the perjury of witnesses. But, when the act intended to guard against frauds and perjuries, it left the courts at liberty to take into consideration those circumstances which are not liable to pervariation.

Vide ante
Brady v.
Cubitt, f. 42.

Ante f. 41.

Mr. Justice Buller said, that the only question was, whether a child *in ventre sa mere* be or be not in the same situation as a child actually born, and that there was no distinction between them. That he had looked into the register's book for the case of *Brown v. Thompson*, where it did not appear that the child was born during the parent's life. That that case was first heard before the Master of the Rolls, who decreed a revocation of the will, though that decree was afterwards re-

versed

versed by Lord Keeper *Wright*, from the peculiar circumstances of the case. They must take it, that, in that case, the child was not born during the devisor's life; if so, the opinion of the Master of the Rolls goes the full length of deciding the case; and he agreed, that that opinion was found law.

The Court was unanimous that the will was revoked,

§ 46. Although it is fully established in the preceding cases, that marriage, and the birth of a child, operate as an implied revocation of a will made before the marriage, yet it has never been decided, that either of those circumstances singly, as a subsequent marriage, or the subsequent birth of a child, will have that effect.

Vide Treat.
of Eq. B. 4.
P. 1. c. 2. f. 1.

Jackson v.
Hurlock,
Amb. 487.

§ 47. The marriage of a woman operates as a revocation of a will made by her prior to such marriage; for, if the wife dies before her husband, it can have no operation, the making of the will being only the inception of it, as it does not take effect until the death of the devisor. But if, in a case of this kind, the wife survives her husband, the will is revived, and takes effect as if she had never been married.

A Woman's
Will revoked
by Marriage.
Forse v.
Hembling,
4 Rep. 61.
Doe v. Staple,
2 Term R.
684.
Hodson v.
Lloyd,
2 Bro. R. 534.
Plowd. 343.

§ 48. It was established as a rule, long before the statutes of wills, that any alteration of the estate in lands devised, by the act of the devisor, after the publication of his will, operated as an implied revocation of such will. This doctrine is founded on three reasons.

Alteration of
the Estate.

Ante ch. 3.
f. .

fons. 1st, On the favour which the law shews in every instance to the heir. 2d, On a principle already stated, that a deviser must not only be actually seised of the lands, at the time when he makes his will, but must also continue to be seised thereof till the time of his death. And, 3d, Because any alteration of the estate devised, is held to be evidence of an alteration in the intention of the deviser.

Alienation to
a Stranger.
1 Roll. Ab.
615, 616.

§ 49. An actual sale or disposition of the estate by the deviser, after he has made his will, operates as a revocation; for, in such case, the testator does not die seised; and his alienation is undoubted evidence of an alteration of intention, in conformity to the rule of the civil law, from which this doctrine was probably derived. *Est enim rei legatæ alienatio species tacitæ ademptionis, quoniam hoc ipso, quod testator rem in alium transfert, recedere a priori voluntate videtur.*

Vin. ad Inst.
Lib. 2. Tit. 20.
f. 12.

Sparrow v.
Hardcastle,
Amb. 224.
3 Atk. 799.
7 Term. R.
416.

§ 50. A person devised all his manors, messuages, and hereditaments whatsoever to trustees, in trust for his nephew and his issue in strict settlement. The testator afterwards conveyed an advowson, whereof he was seised at the time of making his will, to trustees and their heirs; and, by another deed, declared the trust of that conveyance. It was decreed by Lord *Hardwicke*, that the conveyance of the advowson was a revocation of the devise of it.

Arnald v.
Arnald,
1 Bro. R. 401.

§ 51. *Elizabeth Milner* devised a house to her sister *Catherine* for life, and, after her decease, devised the same to trustees, in trust to sell; afterwards, the testa-

trix

trix herself sold the estate: and it was decreed, that this sale was a revocation, not only of the house, but also, of the devise of the money to arise from the sale.

§ 52. Even an agreement or covenant to convey lands which have been previously devised, will operate in equity, though not at law, as a revocation of such devise.

§ 53. A person devised six houses to his wife; afterwards the testator, by articles, covenanted, in consideration of the marriage of his eldest daughter, to settle a moiety of his real estate on her. Lord King held, that though this was but a covenant, and, therefore, did not at law revoke the will, yet it being for a valuable consideration, was, in equity, tantamount to a conveyance, and, consequently, a revocation of the will.

Rider v.
Wager,
2 P. Wm. 328.

Cotter v.
Lacy, 2 P.
Wm. 622.

§ 54. In the case of *Parsons v. Freeman*, Lord Hardwicke said, that “ what was a revocation at law, shall hold in equity; as it would be very mischievous, that the same sort of conveyance should not be a revocation in both cases: therefore, if a man having an equitable estate makes his will, and then executes a conveyance, and disposes of it, or declares the use to himself, that will be a revocation, if it would be so of a legal estate at law*.”

3 Atk. 741.

* This doctrine was fully discussed and established in the case of *Brydges v. the Dukes of Chandos*, and *Goodtitle v. Otway*, which will be stated in a subsequent part of this chapter.

An intended
Alienation.

§ 55. Even an intended alienation of an estate previously devised, which fails of taking effect, for want of some formality in the instrument, has been held to operate as a revocation. Thus, a feoffment without livery, and a bargain and sale not inrolled, have been held to be revocations of prior devises; because such intended alienations were considered as proofs of an alteration of intention.

1 Roll. Ab.
615. 3 Atk.
73. 803.

Shove v.
Pinckie,
5 Term R. 124.

§ 56. It was held, in a modern case, by the Court of King's Bench, that a deed intended to operate as an appointment of uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention.

Alienation to
the Use of
the Devisor.

§ 57. An alienation to a trustee, without any intention of departing with the estate, and though the alienor takes back the old use, has been held to operate as a revocation of a prior devise. Because, in such cases, there is an interruption of the seisin; and also, because a presumption in favour of the heir at law arises from the alienation, that there was an alteration in the intention of the testator.

Dyer 143 b.

§ 58. Thus it was determined in *Mich. 44 Edw. 3.* that where a man seised in fee of lands devisable by custom, made his will, he having then two sons, and, upon their death, aliened the land in fee, and took back an estate in fee, the will was thereby revoked.

Lord Lin-
coln's Case,
1 Ab. Eq. 411.
Show. Parl.
Ca. 154.

§ 59. Lord *Lincoln* devised all his estates to the person to whom his title was to descend, and, afterwards, conceiving

conceiving that he should marry a certain Lady, though the Lady never had any such intention, he conveyed his estate by lease and release to trustees, in consideration of his intended marriage, to the use of himself and his heirs, until the marriage should take effect, and then, as to part, for his intended wife, &c. No marriage ever took place, and Lord *Lincoln* died without doing any other act. It was decreed, that this conveyance operated as a revocation of the will; and the decree was affirmed in the House of Lords.

It is said, that the Judges were equally divided in this case, and that all the Lords voted. Lord *Mansfield* has said of it, “ The absurdity of Lord *Lincoln*’s case “ is shocking, however it is now law.”

4 Burr. 1940.
3 Atk. 803.
Doug. 695.

§ 60. *A.* by his will dated in 1708, gave several pecuniary and specific legacies, and then gave all his real and personal estate, after all his debts and legacies paid, to *B.*, on condition he took the name of *A.* upon him and the heirs male of his body, with divers remainders over. Afterwards, in 1709, *A.* together with *J. S.* his trustee, by lease and release, conveyed several manors to trustees and their heirs, to the use of himself for life, without impeachment of waste; and that the trustees and their heirs should execute such conveyance and conveyances thereof, as *A.* by writing under his hand and seal, or by his last will, &c. should direct or appoint. In 1710 *A.* died, without altering or revoking the said will, or making any other appointment touching the said real estate. It was decreed, that

Pollen v.
Huband,
1 Ab. Eq. 412.
7 Bro. Parl.
Ca. 433.

that the lease and release was a revocation of the will, and affirmed in the House of Lords.

Alienation to strengthen the Devise.

§ 61. An alienation made for the sole purpose of strengthening or giving effect to a previous devise, has, notwithstanding, been held to operate as a revocation, on account of the interruption of the seisin; for, in such a case, no alteration of intention could be presumed.

Hussey's Case
Moo. 789.
1 Roll. Ab.
614.

§ 62. A bastard made his will, and thereby devised a certain manor; afterwards, he made a feoffment of the same manor, to the use of such persons, and for such estates as he had already declared by his will. It was adjudged, that this feoffment was a revocation of his will.

Lutwich v. Mitton,
1 Roll. Ab.
614.

§ 63. A person covenanted, by indenture, to levy a fine to the use of such persons as he should nominate by his will, and, afterwards, he made a will, by which he devised the lands to certain persons. He then levied

Hick v. Mors,
A.nb. 215.

a fine in pursuance of the covenant, and it was agreed that the fine operated as a revocation of the will.

Fine and Recovery.

§ 64. Where a person who has devised his lands afterwards levies a fine, or suffers a recovery of them, these acts will operate as a revocation of the preceding devise.

3 Will. Rep.
12.

§ 65. Thus, if a person seised in fee of lands, devises them, and afterwards levies a fine, though he declares the use to himself in fee, or makes no declaration,

ration, in which case, the old use results to him; yet this has always been held to be a revocation; because the courts will presume in favour of the heir, that the testator had an intention to alter or revoke his will, by such an act done after the will.

§ 66. A common recovery has the same effect, as where a tenant in tail made his will, and thereby devised certain lands, and, afterwards, by bargain and sale inrolled, conveyed the same to a tenant to the *præcipe*, against whom a common recovery was suffered with voucher of the tenant in tail, to the use of himself in fee. It was determined, that the recovery operated as a revocation of the will.

Dister v.
Dister, 3 Lev.
108.

§ 67. Sir *H. Turner* being seised of a considerable estate in tail male, with remainder to himself in fee, made his will, by which he devised his estate to his nephew (who was not his heir at law) in strict settlement. Afterwards, Sir *H. Turner* suffered a common recovery of this estate, to the use of himself in fee. Upon the back of the will was written, "*This is my will;*" and afterwards, "*but not now so intended.*"

Marwood, v.
Turner,
3 P.Wm.163.

It was determined that the recovery, and the declaration of the uses of it to Sir *H. Turner* and his heirs, being subsequent to the will, and inconsistent therewith, as declaring the estates should go to his heir at law, and not to his devisee, operated as a revocation of the will. And it was observed, that a common recovery, as it is a solemn conveyance upon record, and stronger than a feoffment, must needs be a revocation; the recovery,

being suffered by the tenant in tail, plainly gains an absolute fee derived out of that estate tail, and which fee was never devised: consequently, it must be even stronger than the case, where a man having lands devises them, and afterwards makes a feoffment of them; though to the use of himself and his heirs, and though this use be the old use and to the old estate, yet, according to the several cases in 1 *Roll. Ab.* 614. it is a revocation; and the case of *Dyster v. Dyster* was cited as exactly in point.

Ante f. 66.

Parson's v.
Freeman,
3 Atk. 741.
Forr. MSS.

§ 68. By marriage articles it was agreed, that the wife's estate, whereof she was tenant in tail, should be conveyed to the husband in fee. After the marriage, the husband devised those lands; and afterwards the husband and wife suffered a recovery of those lands, to such uses and for such estates as they should jointly appoint; and, in default of such appointment, to the use of the husband and his heirs. No appointment was made. It was decreed by Lord *Hardwicke*, that the will was revoked by the recovery: and his Lordship is reported to have said, "It is admitted that, if
" the testator had been seised in fee, at the date of the
" will, and had afterwards suffered a recovery, that
" would have been a revocation: and yet the objec-
" tion would have held equally there, of the altera-
" tion being made only for the particular purpose to
" enable him and his wife to dispose without any other
" form of conveyance. There are a great variety of
" cases, and nice and artificial distinctions, upon the
" favour to the heir. One rule, however, is certain,
" that if a man is seised in fee, and disposes by will,
" and

2 Vef. 431.

“ and afterwards makes a conveyance taking back a
 “ new estate, that is a revocation. So, if he devises
 “ the land, and levies a fine without any use declared,
 “ this is a revocation, and yet he takes back the old
 “ use unaltered ; which is a prodigious strong case.”

§ 69. *Vincent Darley*, being seised of several real and leasehold estates, made his will ; by which, he devised all his real estates in the counties of *Devon* and *Cornwall* to the respondent *Langworthy*, in strict settlement.

Darley v.
Langworthy;
 Amb. 653.
 3 Will. R. 6.
 3 Bro. Parl. Ca.
 359.

Some years after making this will, the testator suffered a common recovery of several parts of the estates thereby devised, and, by proper deeds and conveyances, declared the uses of such recovery to himself in fee.

The heir at law of the testator filed his bill in the Court of Chancery, insisting that, as the recovery was suffered by the testator long after the making of his will, and as the testator did not republish the same, or make any other will of the said estates, after suffering such recovery, the will was thereby revoked, with respect to any devise therein made of any of the premises included in the recovery, and that they descended to the heir at law.

The cause was heard before Lord Chancellor *Camden*, when his Lordship ordered a case to be stated, for the opinion of the Court of Common Pleas, upon the following question, *viz.* “ Whether the deed executed,

“ and the recovery suffered by *Vincent Darley* was a
 “ revocation of the will ?” And, the case having been
 fully argued before that court, the judges certified
 their opinion, that the deeds executed, and the reco-
 very suffered, by the testator *Vincent Darley*, were a
 a revocation of his will, as to the lands comprised in
 the recovery.

The Lord Chancellor decreed accordingly ; and
 the House of Lords affirmed the decree as to this
 point.

Ante ch. 3.
 f. 13.

§ 70. In the case of *Selwin v. Selwin*, which has
 been stated in a former chapter, the will, though
 made before the return day of the writ of entry on
 which the recovery was suffered, and to which it had
 relation, was held not to be revoked by the recovery ;
 because the bargain and sale and recovery ought to be
 considered as one transaction, and as constituting one
 whole, by reference to its inception.

Modern Doc-
 trine of Pre-
 sumptive
 Revocations.

3 Burr. R.
 1491.

Doug. 722.

§ 71. The doctrine of presumptive revocations ap-
 pears to have been carried much too far, and has been
 disapproved of by the ablest judges of modern times.
 Lord *Mansfield* has said, “ That constructive revoca-
 “ tions contrary to the intention of the testator ought
 “ not to be indulged. And that some overstrained
 “ resolutions of that sort had brought a scandal on
 “ the law.” And on another occasion his Lordship
 said—“ All revocations which are not agreeable to the
 “ intention of the testator, are founded on artificial
 “ and absurd reasoning.” It is however now fully
 settled,

settled, that wherever a person who has devised an estate, afterwards makes any alteration in it, by any mode of conveyance whatever, inconsistent with the preceding devise; or by which such estate becomes in any respect different from what it was before; such an alienation will operate as a revocation of the prior devise.

§ 72. By articles made in 1777, previous to marriage, the Duke of *Chandos* covenanted that he would, within six months after the marriage, cause various freehold and copyhold estates to be well and sufficiently conveyed to him, to the intent that the Dukes might become entitled to dower thereout; and also that he would within twelve months after the marriage and after such conveyances, settle the said estates, subject to dower, to the use of himself for life, remainder to trustees to preserve contingent remainders; remainder, after the decease of the Duke and Dukes, to other trustees for a term of years to raise portions for younger children; remainder to the first and other sons of the marriage in tail male, remainder to the right heirs of the Duke. The marriage took effect; and the Duke by his will, dated the 9th of *January* 1780, confirmed the articles, and devised all the estates which he had agreed to settle, in case of failure of issue male, to the Dukes for life, remainder to his daughters as tenants in common in tail, with other limitations.

Brydges v.
Dukes of
Chandos,
2 Ves. Jun.
417.

Afterwards, (in *October* 1780) the Duke executed a settlement, purporting to be in pursuance and performance

formance of the articles; by which he granted and released all the estates comprised in the articles to trustees, to the use of himself for life; remainder as to part to the Dukes for life, and as to another part for securing a jointure of 2000*l.* a year to the Dukes; remainder to trustees for a term of 1000 years to secure portions for younger children, nearly as in the articles; remainder to the first and other sons of the marriage; remainder to the Duke in fee.

Lord *Loughborough* said, that a court of equity could not adopt different rules, respecting the transmission of estates, from those established at law. That the settlement being in many points inconsistent with the articles, and also with the will, must be deemed a revocation of the will, and decreed accordingly; and, on an appeal to the House of Lords, the decree was affirmed.

7 Bro. Parl.
C. a. 505.

Goodtitle v.
Way,
Term Rep.
322.

§ 73. Sir *Thomas Cave*, being seised in fee of several estates, by articles entered into previous to his marriage with Lady *Lucy Sherrard*, agreed to make a provision for his intended wife, and the issue of the marriage out of those estates. Sir *Thomas Cave* made his will, dated 13th *March* 1791; by which he devised his estates (in case he should die without issue of his body) to his uncle the Rev. *Charles Cave*, and his issue male, in strict settlement.

By deeds of lease and release, dated 25th and 26th *May* 1791, reciting the intended marriage, and that he had agreed, upon the treaty for the said marriage,

to

to settle a jointure upon Lady *Lucy*. In consideration of the marriage, and of the fortune of Lady *Lucy*, Sir *Thomas* conveyed the estates in question to trustees and their heirs, to several uses. And by other deeds of lease and release he conveyed other estates to trustees and their heirs, to the intent that Lady *Lucy* might receive an additional jointure; with a limitation of the land to trustees for 500 years, for better securing the payment of the said additional jointure.

The marriage took place on the 2d of *June* 1791, and in about six months Sir *Thomas* died without issue, leaving *Sarah Olway* his heir at law.

A question arose in a suit in Chancery, between the devisee and the heir at law of Sir *Thomas*, whether the deeds of lease and release, of the 26th *May* 1791, operated as a revocation of the will?

By consent, the parties were ordered to proceed to a trial at the bar of the Court of Common Pleas; where a special verdict was found, stating the above facts. The Judges of the Court of Common Pleas delivered their opinion *seriatim* on the special verdict; and were unanimously of opinion, that the first deeds of lease and release operated as a revocation of the will, as to the lands comprised therein. And three of the Judges thought the second deeds of lease and release had the same effect; but Lord Ch. Just. *Eyre* was of opinion, that they did not operate as a revocation.

Vide 1 Bos.
and Pull. R.
576.

A writ of error was brought from this judgment in the Court of King's Bench ; when Lord *Kenyon* began by observing, that the marriage settlement executing the articles, and on which the principal question depended, limited the reversion in fee to Sir *Thomas Cave*, his heirs and assigns for ever ; therefore the whole use was disposed of some way or other. His Lordship then stated the cases of *Parsons v. Freeman*, and *Sparrow v. Hardcastle* ; and observed, that the doctrine, which Lord *Hardwicke* wished to establish, was this :—that any alteration of the estate, or conveyance to uses, after making the will, though the old use remained, (which was the case here) was in law a revocation of the will. Suppose that in this case Sir *T. Cave* had merely made a conveyance to the use of himself and his heirs for ever ; that would undoubtedly have operated as a revocation of his will : then could the other uses, to which he conveyed the estate, make any alteration ? His Lordship said, it had been supposed in the course of the argument, that the case of *Brydges v. the Duchess of Chandos* proceeded on equitable principles ; but he knew that the Lord Chancellor meant by that decision to confirm the doctrine, established by Lord *Hardwicke*. His Lordship concluded by saying,—“ I do not enter into the reasons, “ upon which all the cases have been determined ; be- “ cause the best rule is ‘*stare decisis*’. But my opi- “ nion is formed upon the authority of all the cases “ from the time of Lord *Rolle*. Such were the “ opinions of Lord *Trevor*, Lord *Hardwicke*, and “ Lord *Mansfield* ; the latter of whom, though find-
“ ing

“ ing fault with former decisions, thought himself
 “ fettered by the authorities. I take it therefore, that
 “ the law of the land is now clearly and indisputably
 “ fixed, if at any time it can be fixed; that where
 “ the whole estate is conveyed away to uses, though
 “ the ultimate reversion of it comes back again to the
 “ grantor, by the same instrument, it operates as a
 “ revocation of a prior will. That being the law, I
 “ am bound (how unfortunate soever it may be in this
 “ case) to give my opinion in favour of the de-
 “ fendant; and consequently the judgement of the
 “ Court of Common Pleas must be affirmed.

The Cause coming on again in the Court of Chan-
 cery upon the equity reserved, the court was clearly of
 opinion, that the will was revoked in equity, as well
 as at law, and decreed accordingly. And, on an ap-
 peal to the House of Lords, the decree was affirmed.

3 Vef. Jun.
682.

7 Bro. Parl.
Ca. 593.

§ 74. In the case of a revocation by the execution
 of a conveyance of lands, subsequent to a devise of
 them, parol evidence is not admissible to prove that
 the testator meant his will should remain in force, and
 unrevoked by the subsequent conveyance.

Parol Evi-
dence not
admissible.

§ 75. In the case of *Goodtitle v. Otway*, the plaintiff
 went into evidence in the Court of Chancery of the
 testator's conversations with his lady and the attorney,
 who prepared all the instruments, to shew the motives for
 making the will, and that the testator had no intention
 to revoke it, and after the marriage referred to it as
 his will. But the Lord Chancellor was clearly of

2 Vef. Jun.
606.

opinion that the parol evidence, being evidence of a republication, if any thing, could not be received. That if the deed did not affect the will at law, it was out of the question; if it did, he could not set it up again by parol evidence.

2 H. Black,
R. 516.

Upon the trial at bar in the Court of Common Pleas, the same evidence was offered but the court refused to admit it. And Mr. Justice *Buller* observed, that in order to determine whether the evidence was, or was not admissible the court was to consider, to what it was to be applied. If the question was, whether the testator was incapacitated, or the instructions given were duly followed, the evidence would be admissible. But here the end proposed by it was to shew that the deeds should have a different construction from that which the words imported. That there was a great difference between cases which depended on circumstances, and those which depended on the solemn acts done by the party himself, and that distinction supported the case of *Brady v. Cubitt*. There was no act in that case done by the testator importing that he meant to revoke his will, or change it in any respect; but changes having happened in his family, by marriage and the birth of a child, there was a presumption of revocation, and therefore it was to answer that presumption that the court received parol evidence; but he could not find from any one case quoted at the bar, that the court had received parol evidence in the case of a deed executed by the party himself, with a view of altering the construction of the instrument.

Ante.

§ 76. A conveyance obtained by fraud, will not operate as a revocation of a prior devise, because when such a conveyance is set aside, it is considered as a mere nullity.

A fraudulent Conveyance is not a Revocation.

§ 77. *Francis Hawes* being seised of the reversion in fee of an estate, subject to the life interest of his father, made his will, and thereby disposed of it. The testator's father afterwards obtained from him a conveyance of his reversion by fraud. And the Court of Chancery having directed the deed to be delivered up, to be cancelled, said it was no deed, and therefore could not operate as a revocation of the will.

Hawes v. Wyatt,
3 Bro. R. 156.

§ 78. A mere alteration of the quality of an estate, without any intention of varying the quantity of the interest, or the disposing power of the owner, will not operate as a revocation.

Nor an Alteration of the Quality of an Estate.

§ 79. Thus where a man having feoffees to his use, before the statute 27 *Hen.* 8. devised the lands to another; and afterwards the feoffees made a feoffment of the land to the devisor. It was agreed that this feoffment did not operate as a revocation of the devise; for after the feoffment the devisor had the same use which he had before.

1 Roll. Ab.
616. pl. 3.

§ 80. It follows from this case that the acquisition of the legal estate alone, will not operate as a revocation of a devise. And Lord *Hardwicke* has said that if a person having an equitable estate, makes his will, and

Amb. 119.
3 Atk. 749.

Vide Williams
v. Owens,
2 Vef. Jun.
595.

and afterwards takes a conveyance of the legal estate, it is not a revocation.

Nor the
Change of a
Trustee.

§ 81. It has been determined upon the same principles that the mere change of a trustee does not create a revocation of a prior devise.

Watts v.
Fullarton,
Doug. 718.

§ 82. *W. Watts* devised all his real estates to trustees upon certain trusts. He afterwards made a codicil reciting that since the publication of his will he had contracted for the purchase of certain lands, and thereby directed the trustees and executors named in his will, to pay the purchase money, and that the said purchased premises should be conveyed to the same uses as he had declared concerning his other estates. Afterwards the testator himself completed the purchase, and took a conveyance of the estates to trustees in trust for himself and his heirs. The question was, whether the conveyance of the new purchased lands to the trustees, subsequent to the codicil, was not a revocation, the testator at the time of making the codicil having only a trust estate, and the vendor being a trustee for him, so that before his death the legal estate was conveyed to other trustees. Lord *Bathurst* decreed there was no revocation, relying much on the general proposition laid down by Lord *Hardwicke* in *Parsons v. Freeman*,—"That where a man has an equitable interest in fee in an estate, and afterwards takes a conveyance of the legal estate to the same uses, this is no revocation."

3 Atk. 749.

§ 83. Sir *John Gibbon* having mortgaged his estates in fee, and then made his will by which he devised them. Afterwards he paid off the mortgage, and took a conveyance of the estate to a trustee for himself. And the Court of King's Bench held that this being no more than a bare change of a trustee the will was not revoked.

Doe v. Pratt,
Doug. 709.

§ 84. A partition between tenants in common does not operate as a revocation of a prior devise, even though such partition be corroborated by a fine,

Nor a Partition.

§ 85. *Dorothy Kirby* by her will, taking notice that she was tenant in common with another person, devised her moiety to trustees. She afterwards by indenture between her and the other tenant in common covenanted to levy a fine of all the premises, and declared the uses thereof, as to certain farms, &c. being one moiety, to *Dorothy Kirby* and her heirs, and as to other farms, &c. being the other moiety, to the other tenant in common, and her heirs, and a fine was levied accordingly. A question having arisen whether this deed and fine operated as a revocation of the will, the Lord Chancellor referred it to the Judges of the Court of King's Bench, who gave their opinion that they were not a revocation, with which the Chancellor agreed, and decreed accordingly.

Luther v. Kirby,
8 Vin. Ab. 148.
3 P. Wms. 169.
Risley v. Baltinglass,
T. Raym. 240.

§ 86. But where a partition is made, and a fine is levied, not merely to establish the partition, but also for another purpose, and the estate in the land is altered

Unless it extends to other Things.

altered, it will then operate as a revocation of a former devise.

Tickner v. Tickner, cited
3 Ark. 742.

§ 87. *Henry and Robert Tickner* being seised of an estate in gavelkind, *Robert* devised his undivided moiety to his wife in fee. Afterwards by deed of partition and fine all the gavelkind estate which *Robert* had devised, was allotted entirely to *Robert*, to such uses as he should appoint by deed or writing, and in default of such appointment to him in fee. Lord Ch. Just. *Lee* after mature deliberation held this transaction to be a revocation of the will.

8 Ves. Jun.
281.

Of partial
Revocations.

§ 88. A conveyance to revoke a will must be of the whole estate, and must extend as far as the appointment which the will has made, for if it is but of a part, it affects the will no farther than that part goes; if it is of a particular interest only, it will not operate as a revocation of the rest.

§ 89. It has been determined upon this ground that a lease made of lands already devised by will, only operates as a partial revocation, or a revocation *pro tanto*, of such will.

Hodgkinson v. Whood,
Cro. Car. 23.
1 Vern. 97.

§ 90. A person devised his lands to his eldest son, and afterwards made a lease of them for thirty years to his second son to begin after his death. It was resolved that this lease only operated as a partial revocation of the will, *quoad* the lease, for both might well stand together. But if the lease had been made to
the

the devisee, then it would have been a revocation, because they would be inconsistent with one another.

Coke v. Bullock,
Cro. Ja. 49.

§ 91. Although a mortgage in fee, made after the publication of a will, is a revocation of such will at law, yet in equity it is only a revocation *pro tanto*, and the equity of redemption shall go to the devisee.

Hall v. Dunch,
1 Vern. 329.
3 Atk. 805.
2 P. Wms. 334.

§ 92. But if lands are devised to a person in fee, and the testator afterwards mortgages them to the devisee, it is a revocation *in toto*, being inconsistent with the devise.

Harkness v. Bayley,
Prec. in Ch. 514.

§ 93. A conveyance for raising money to pay debts, being only made for a particular purpose will only operate as a revocation *pro tanto* of a prior devise, so far as relates to the payment of the debts; and no farther.

Vernon v. Jones, Prec. in Ch. 32.
Ogle v. Cook,
cited 2 Bro. R. 592.

§ 94. But where a person after having made his will, executed a conveyance in trust for payment of debts in a schedule, and instead of declaring the uses to himself in fee, after payment of the debts, he declared that the trustees should convey to such uses and purposes as he by deed or will should appoint, and for default of appointment to himself in fee, it was held to be a revocation.

Kenyon v. Sutton, cited 2 Vef. Jun. 600.

Tickner v. Tickner,
Ante.

§ 95. With respect to leasehold estates, it has been long settled, that a surrender of a lease for lives, and the taking a new lease will operate as a revocation of a former devise of such new lease; for the testator by the surrender divests himself of his whole estate

Revocations of Leasehold.

in the old lease, and acquires a new estate by the renewal.

Marwood v.
Turner,
3 P. Wms.
163.

§ 96. Sir *H. Marwood* being seised of an estate for three lives, held of the Archbishop of *York*, made his will by which he devised this lease. He afterwards surrendered it, and took a new lease; it was determined that this surrender and renewal operated as a revocation of the devise of the lease; for by the surrender, the testator had put all out of him, had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fall; and the new purchase being of a freehold descendible, could not pass by a will made before such purchase.

Galton v.
Hancock,
2 Atk. 424.

§ 97. A purchase of the reversion expectant on a lease for lives, will operate as a revocation *pro tanto* of a devise of such estates for lives, for the same reason.

§ 98. Although a term for years acquired after the making of a will passes by it, yet if a testator devises a term for years, of which he is then possessed, and afterwards surrenders it, and takes a new term, this will operate as a revocation of the new term.

Abney v.
Miller,
2 Atk. 593.
Ridstone v.
Anderson,
2 Ves. 418.
Horne v.
Medcraft,
1 Bro. Rep.
261.

§ 99. A person devised certain college leases for years to his mother, upon certain trusts. The testator afterwards surrendered the college leases thus given, and took new leases. Lord *Hardwicke* decreed that the devise was revoked.

§ 100. If

§ 100. If however the words of a will shew that it was the testator's intention to dispose of all terms for years, whereof he should die possessed, a renewed term will pass, for a term for years being only a chattel, there is no necessity for a possession at the time when a devise of it is made, or of a continuance of such possession till the testator's death. Ante ch. 3.
f. 39.

§ 101. A person devised in the following words ;
“ As to all and singular my leasehold estate, goods,
“ chattels, and personal estate whatsoever, I give the
“ same to my daughter.” The testator after making this will renewed a lease for years with the Dean and Chapter of *Windfor*, and Lord *Hardwicke* held that this passed by the will.

§ 102. Although a surrender and admittance of a copyhold tenant, operates in most cases as a revocation of a prior will of such copyhold, yet it has been determined that an admittance to a copyhold grounded on a prior surrender, does not operate as a revocation of an intermediate will. Revocation of
Copyholds.

§ 103. *B. North* in 1724 surrendered certain copyholds, in consideration of marriage, to the use of himself for life, remainder to his wife for life, remainder to the children of the marriage in tail, remainder to himself in fee. In *May* 1725 he surrendered the same premises to the use of his will, and in *April* 1743 he made his will, by which he devised them to his wife in fee. In *May* 1751, he was admitted according to the terms of the first surrender ; and the question

question was, whether this admittance operated as a revocation of his will. Lord *Mansfield* said, that this case was directly within the principles of the case of *Selwin v. Selwin*, that the whole of a conveyance shall be taken together, and the several parts of it shall relate back to the principal part, so that either no alteration at all was made by the admittance, or if there was any, yet the admittance should have relation back to the time of making the surrender, therefore the admittance did not operate as a revocation. The other Judges concurred in the same opinion, and all agreed that after the surrender in 1724 to the uses of the marriage settlement the reversion still remained in *B. North*; and that no alteration or change of estate happened in this case.

Vide
Thrustout v.
Cunningham,
Ferne Cont.
Rem. 90.

TITLE XXXVIII.

DEVISE.

CHAP. VII.

Of the Republication of Devises.

- | | |
|--|---|
| § 1. <i>Nature and Effect of.</i>
2. <i>Re-execution is a Republication.</i>
3. <i>And also a Codicil.</i>
11. <i>Unless confined to Lands devised by the Will.</i> | § 14. <i>A surrender of a Copyhold to the Use of a Will.</i>
16. <i>Cancelling a Second Will republishes the First.</i>
18. <i>But a Will once cancelled must be re-executed.</i> |
|--|---|

Section I.

AS a will of land is ambulatory during the life of the testator, and may be revoked by him at any time before his death, so it may be republished; and a republication of a will has a twofold effect, first, To give a will all the effect of a will made at the time of its republication; and, secondly, To set up and re-establish a will that has been revoked.

Nature and Effect of.

§ 2. The first mode of republishing a will, is by a re-execution of it; and, although it was held before the statute of frauds, that any words importing an intention to republish a will, amounted to a republication, yet it is now settled, that an express republication of a will must be attended with the same circumstances that are necessary to its first publication; for, otherwise, the statute of frauds would be evaded.

Re-execution is a Republication.

Martin v. Savage,
1 Vel. 440.

And also a
Codicil.
Litton v.
Lady Falk-
land, 3 Rep.
in Cha. 90.
Penphraſe v.
Ld. Lanf-
downe,
Lucas 96.

§ 3. It was formerly held, that after the ſtatute of frauds, there could be no deviſe of lands by an implied republication, for the paper on which the deviſe was contained ought to be re-executed. But it was afterwards determined, that a codicil duly attested and annexed to a will, or referring to a will, ſhould operate as a republication of ſuch will, ſo as to make it take effect from the execution of the codicil; by which means, lands purchaſed after the execution of the will, and before the execution of the codicil, paſs by it.

Acherley v.
Vernon. Com.
R. 381. 3 Bro.
Parl. Ca. 85.

§ 4. A perſon, by a codicil executed according to the ſtatute of frauds, reciting that he had made his will, added, “ I hereby ratify and confirm my ſaid will, “ except in the alterations after mentioned.” It was decreed, that the teſtator’s ſigning and publiſhing this codicil in the preſence of three witneſſes, was a republication of his will, and both together made but one will; and, therefore, that lands purchaſed after the execution of the will, and before that of the codicil, paſſed by it. And upon an appeal to the Houſe of Lords the decree was affirmed.

Potter v.
Potter,
1 Vef. 437.

§ 5. A teſtator, by a codicil written on the back of his will, gave additional legacies and annuities, ratifying and confirming his will, and attested by three witneſſes, in theſe words: “ This will, with the ſeveral “ additions and alterations above, was ſigned, ſealed, “ and republithed by the teſtator as his laſt will and “ teſtament, in the preſence of us the ſubſcribing wit- “ neſſes.” He afterwards made another codicil on a ſeparate piece of paper, which, though not dated, was
agreed

agreed to have been made about four or five days before his death, in presence of three witnesses; reciting, that having in his will appointed several limitations and remainders of his estate, some of which were not agreeable to his present intent, he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith. The attestation of which paper was, "Signed, sealed, published, and declared by the testator, as a codicil to the last will and testament."

Sir J. *Strange* M. R. was of opinion, that the first codicil amounted to a republication; it answered the idea of a republication, being indorsed on the will, and attested as the statute required, the word republished was used, which put it out of doubt; but if not, it would have amounted to a republication, as operating by additional charge on the real estate, and then concluding by ratifying and confirming the will. That in all cases of republication, no precise form of words was necessary; but any denoting the continuance of the testator's mind, so far as he made no alteration, would do, 1 Roll. Ab. 617. (Z. 1.). He was also of opinion, that the second codicil amounted to a republication. It was an express declaration that the rest of his intent, not inconsistent therewith, should continue and be confirmed. It might be mischievous to construe, that no republication could be but by the testator's taking the will in his hands and republishing that by indorsement on it, or annexing the codicil to the will itself; the law in favour of the power of devising had dispensed with many forms of expression

which would be absolutely necessary in other instruments, and will infer republication from an act done as in 1 Roll. Ab. 617. The person intending to republish might be at a distance from the will itself, or might not have it in his power, by its being in another's custody, and might know the substance, though he could not repeat the particulars.

§ 6. The preceding cases appear to establish the proposition, that where a codicil ratifies and confirms a will, it operates as a republication of it. And Lord *Hardwicke* seems to have been of this opinion. But, in some subsequent cases, it was held, that a codicil which was not annexed to, or incorporated in the will, would not operate as a republication of it, unless an intention to republish appeared.

Gibson v.
Rogers,
Amb. 965,
1 Ves. 492.

§ 7. Thus, it is laid down by Lord *Camden*, that a codicil only operates as a republication of a will in two cases. 1st, By being annexed to it: and, 2d, By the contents shewing the intention. And his Lordship decreed, in the case cited in the margin, that the will was not republished by a codicil, because the codicil was not annexed to the will; and there was nothing in the codicil which shewed any intent in the testator to republish the will.

Att. Gen. v.
Downing,
Amb. 571.

§ 8. The doctrine laid down by Lord *Camden* in the above case appears, however, not to have been assented to, but that established in *Acherley v. Vernon* to be the better one.

§ 9. A tes-

§ 9. A testator by a will properly executed, devised all his estates in the county of *Kent* that he might die seised or possessed of, to trustees, upon trust to sell them to pay his debts, and then to apply the remaining produce to various purposes. Afterwards he purchased other lands in *Kent* subject to a mortgage, and covenanted in the purchase deed to pay the mortgage money and gave a bond to indemnify the vendor. Afterwards by a codicil dated 29th *November* 1784, which he described to be a codicil to his last will and testament, he made some slight alterations in his will, and declared that he ratified and confirmed it. The codicil was begun upon the last sheet of the will, and finished upon another sheet, and was executed in the presence of two witnesses. He afterwards made another codicil, which he began upon the last sheet of the first codicil, and finished upon another sheet, and which was executed in the presence of three witnesses. By the second codicil he revoked a bequest of five shillings *per* week, given by the will to his father, and another legacy; and instead of the latter gave the legatee one moiety of two leasehold houses, and concluded thus: “In witness whereof I the said testator have to this my writing, contained in this and
“part of the said sheet of paper which I declare to
“be a farther codicil to my said last will and testament, and which is to be accepted and taken as
“part thereof, set my hand and seal: that is to say,
“my hand at the bottom of the said preceding sheet,
“and my hand and seal to this last sheet thereof, this
“28th *October* 1788, in the presence of three witnesses.”
The question was, whether the second codicil was a

Barnes v. Crowe,
1 Ves. Jun.
486.
4 Bro. R. 2.

republication of the will so as to pass to the trustees lands purchased after the date of the will.

Lord Commissioner *Eyre* delivered the opinion of the court and said, that upon looking into the cases of *Acherley v. Vernon*, and the *Attorney General v. Downing*, the question, if it was not to be considered as determined, and so determined as that the court could hardly consider itself at liberty to review it, would be a question of great difficulty; for it seemed to him that those two cases were in direct opposition to each other. The latter was determined by a very able Judge, and having the former before him, which increased the difficulty. But it seemed to him upon the best consideration, that the former case was so determined, and was of such authority, that every thing must yield to it. The principle that a codicil attested by three witnesses, shall be a republication seemed intelligible and clear. The testator's acknowledgement of his former will, considered as his last will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself, because by the nature of it, it supposes a former will, refers to it, and becomes part of it, and being attested by three witnesses, his implied declaration and acknowledgement seems also to be attested by three witnesses; before the statute it was no part of the essence of the obligation, that the will should be re-executed. Any thing that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute re-execution of the will is not necessary;

fary; nothing more is required than a writing according to the provisions of the statute expressing that intent. Therefore Lord *Hardwicke* might well say, he saw no great difference between the words, "I desire this codicil may be part of my will," and the words "I republish it," which it was there admitted, would have done. In the *Attorney General v. Downing*, Lord *Camden* supposes a particular intent to republish ought to appear; and that annexation, or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only Lord *Hardwicke's* opinion could not stand, but neither could *Acherley v. Vernon*; for there was no particular intent to republish; but the testator referred to the will, made alterations, and gave sufficient demonstration, that when making and executing the codicil he considered the will as his will; and from that a republication was implied: But it was not particularly in his thoughts to do any formal act of republication. Upon considering these cases he confessed he inclined to stand upon the general proposition stated by Lord *Hardwicke*, to shew the will, in the case before them, was republished. This case had auxiliary circumstances which might seem to bring it within the *Attorney General v. Downing*; for the testator expressly declared by the original will, that he meant it to operate upon all the lands he should die seised or possessed of. If he had not actually incorporated them together, he had inseparably annexed the codicil to the will, not by a wafer or wrapper, or any thing *dehors* the instrument; but by what he called internal annexation, and that of such a kind that all the papers taken together

might be considered as published, when the codicil was executed. But he was afraid to rely upon these circumstances for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol. The general ground was safer and better.

It was decreed that the codicil operated as a republication of the will.

§ 10. The doctrine laid down by Lord Commissioner *Eyre* is confirmed by the following case.

Piggott v.
Waller,
7 Ves. Jun.
98.

Mr. *Piggott* made his will duly attested, by which he devised all his real estates whatsoever to trustees, upon several trusts. The testator made two codicils to his will which only related to personal estate, but were duly attested, the second of which contained these words—"To be annexed to my last will and testament" and made part thereof to all intents and purposes." The testator had purchased a real estate prior to the making of the second codicil, and the question was, whether the codicil operated as a republication of the will, so as to pass that estate,

Sir *W. Grant*, M. R. after stating all the preceding cases, said the Lords Commissioners in *Barnes v. Crowe* appeared to have held that in *Acherley v. Vernon* it was established that every codicil duly attested ought to be held a republication, and to have adopted and acted upon that rule in that case. Their opinion seemed to be that the codicil was incorporated in the will. The general proposition referred to by Lord Commissioner

Commissioner *Eyre* was, that the execution of a codicil should in all cases be an implied republication. Lord Commissioner *Eyre* stated the particular circumstances in that case, amounting to what he called internal evidence of annexation: the first codicil which was not duly executed was begun upon the last sheet of the will, and the codicil duly attested was begun upon the last sheet of that codicil. But Lord Commissioner *Eyre* inclined to think annexation could have no effect, and they abandoned that ground for fear of intrenching upon the statute, by raising evidence out of circumstances in their nature parol, and took the general ground as safer and better. Undoubtedly therefore that case was determined upon that general ground. It would be impossible without contradicting that case, which, as it laid down a general rule, he had no disposition to do, to determine in this case against the republication. Except that single circumstance which Lord Commissioner *Eyre* expressly laid out of the question, the annexation, there was no substantial difference between that case and this. That afforded a certain rule, and if he departed from that, it would only be to set every thing loose again, and not to get back to, what he thought the better, the old rules, for then *Acherley v. Vernon* would be in the way. He was therefore disposed from the convenience of adhering to settled rules, and deference to former decisions, to hold the codicil a republication. And decreed accordingly.

Vide Lord
Walpole v.
Lord Chol-
mondeley,
7 Term R.
138.

§ 11. But where the effect of a codicil is confined to the lands devised by the will to which it is annexed,

Unless con-
fined to Lands
devised by the
Will.

it does not operate as a republication of such will, so as to pass after purchased lands.

Strathmore v.
Bowes, 7
Term R. 482.
2 Bof. & Pul.
500.

§ 12. *George Bowes* devised all his freehold and copyhold lands to trustees, upon certain trusts; he afterwards purchased other lands, and then made a codicil, whereby after reciting that he had devised all his freehold and copyhold lands to trustees, he revoked the same, so far as related to two of the trustees named in his will, and devised his *said* lands, &c. to the other trustees upon the same trusts, and concluded by declaring the codicil to be a part of his will. Upon a case sent out of Chancery for the opinion of the Court of King's Bench, Lord *Kenyon* said, it was clear that a codicil confirming a will of lands in general words, would pass lands purchased between the making of the will, and the codicil. But here the question was, whether it was the intention of the deviser to pass by the codicil any thing more than would have passed by the will itself. Now what was this case, the testator gave all his real and copyhold estates to several trustees by his will, in words sufficiently comprehensive to carry all the estates of which he was then seised. Then he made a codicil, not to extend his will, but only to revoke so much of it, as vested the estates in some of the trustees whom he had named in his will, and then he gave *his said lands*, &c., that is those lands which he had before given by his will, to the rest of the trustees. The court certified that the codicil was not a republication of the will, so as to extend the operation of the will to the real estates purchased after the will was executed; it

extended to the estates devised by the will and no farther.

The Court of Chancery decreed accordingly, and on an appeal to the House of Lords the decree was affirmed; Lord *Thurlow* dissenting, and holding the codicil to be a republication.

§ 13. In the case of *Piggott v. Waller*, the Master of the Rolls said, he did not conceive the decision in *Strathmore v. Bowes* to be inconsistent with that of *Barnes v. Crowe*; it did not follow from the doctrine in the latter case, that, if it distinctly appeared upon the face of the codicil that it was not the intention to republish the will, the codicil should be held a republication. In *Strathmore v. Bowes* the court held that it appeared upon the face of the codicil, that it was not the intention to pass any other lands than those which were devised by the will. It would have been a contradiction therefore to make it pass after purchased lands.

7 Ves. Jun.
124.

§ 14. A surrender of a copyhold estate to the use of a person's will may be worded in such a manner as to operate as a republication of a former will, so as to make the copyhold estate pass by such will.

A Surrender
of a Copyhold
to the Use of
a Will.

§ 15. A person having made his will, and devised all his freehold and copyhold estates to several uses, afterwards purchased other copyhold lands, which he surrendered thus: "To the uses declared or to be de-

Heylin v.
Heylin,
Cowp. 130.

Court

Court of Chancery directed a case to be sent to the Court of King's Bench, whether these copyholds passed by the will.

Lord *Mansfield* said, when a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property he is seised of at the time of the date of the republication, just the same as if he had such additional property at the time of making his will. Therefore, if one devises lands by the name of *B. C.* and *D.* and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands *B. C.* and *D.*; but if the testator, in his will, says, I give *all* my real estate, a republication will affect such newly purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and, I am of opinion, that the surrenderor may express himself so as to make it relate to a will actually made, and that the copyhold lands so surrendered will pass by it. Suppose a testator seised of copyhold lands makes his will, without a surrender, if he afterwards surrender them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them, because it only obviates the mode and form of conveyance. What has the testator done here? having made his will, and declared his lands to uses, he surrenders his newly purchased copyhold lands to the uses, intents, and purposes declared, or to be declared in his will; it is precisely the same thing as if he had said, and whereas I have made a will so and so, and devised
all

all my lands to J. S. to such and such uses, I mean, these newly purchased lands should pass to the same uses. The Court certified, that the surrender did, by express reference to the uses declared by his will, adopt and apply the words of the will to the copyhold lands, as if the testator had been seised thereof at the time of making the said will, and, therefore, they were subject to the same uses to which all the testator's copyhold lands were devised.

§ 16. Where a person made a will, and afterwards revoked it by making another will, but did not actually cancel it, the cancelling of the second will was held to be a republication of the first.

Cancelling a
Second Will
republicates
the First.

§ 17. A person made a will in 1757, and another in 1763; the former was never cancelled, the latter was cancelled by the testator himself: both were in the testator's custody at the time of his death; the second cancelled, the first uncanceled. The counsel for the heir at law contended, that the second will revoked the first, and, being afterwards cancelled, the testator had died intestate; and cited the case *ex parte Hillier*, 3 *Atk.* 798. where Sir *George Lee* determined, that the execution of a second will was a revocation of a first, though the second was afterwards cancelled; and that the cancelling the second did not set up the first, which was the same point, only, that it was personal property.

Goodright v.
Glazier,
4 *Burr.* 2512.

Lord *Mansfield* said, that, with regard to the case *ex parte Hillier*, Mr. *Atkyns* only reported what passed
in

in Chancery ; there might be other circumstances appearing to the ecclesiastical court, which might amount to a revocation of a will of personal estate. Here, the intention of the testator was plain and clear. A will was ambulatory till the death of the testator. If the testator lets it stand till he dies, it is his will ; if he does not suffer it to do so, it is not his will. Here he had two. He had cancelled the second, it had no effect, no operation ; it was as no will at all, being cancelled before his death ; but the former, which was never cancelled, stood as his will

Mr. Justice *Yates* said, a will had no operation till the death of the testator ; the second will never operated, it was only intentional. The testator changed his intention, and cancelled it ; if, by making the second, the testator intended to revoke the former, yet that revocation was itself revocable, and he had revoked it.

But a Will
once cancelled
must be
re-executed.

§ 18. But, where a person having made a new will, cancelled the former one, and afterwards cancelled the latter will, it was held, that this did not amount to a republication of the former will ; because, where a will is once cancelled, nothing but a re-execution of it will amount to a republication.

Burtonshaw v.
Gilbert,
Cowp 49.

§ 19. *Nicholas Newenden* made a will in 1759, of which, he executed a duplicate, and gave it to another person. He made a second will in 1761, at which time he cancelled one of the copies of his first will, by tearing off the seal. After the testator's death, both the
first

first and second wills were found together in a paper cancelled, and the duplicate of the first will was found uncanceled in the testator's room among other papers. It was determined, that the testator had died intestate : for the cancelling the copy which the testator had in his possession of the first will, was a cancelling of the duplicate ; and, therefore, at the time of making the second will, the first was, upon every principle of law, most clearly revoked, and could never be set up again, but by a re-execution.

TITLE XXXVIII.

D E V I S E.

CHAP. VIII.

Of void Devises.

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|---|--|
| § 2. <i>1st. Devise to the Heir at Law.</i>
4. <i>Though charged with Debts, &c.</i>
9. <i>The Devisee must be sole Heir.</i>
11. <i>A Difference in the Estate renders the Devise good.</i> | 16. <i>2d. Devises to charitable Uses.</i>
17. <i>3d. Where there has been Fraud.</i>
19. <i>4th. Where the Devisee dies before the Devisor.</i>
28. <i>5th. Uncertainty.</i> |
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Section 1.

DEVISES are in some cases void *ab initio*, as where the testator devises what the law already gives, or in mortmain, or where any fraud has been practised on the testator. Devises may also become void by an event subsequent to the will, as where the devisee dies in the lifetime of the devisor.

1st Devise to the Heir at Law.

§ 2. With respect to the first sort of devises which are void *ab initio*, it is a rule of law that where a testator makes the same disposition of his estate as the law would have done if he had been silent, the will is unnecessary and void. Therefore if a person devises his lands to his heir at law in fee, it is void, and the heir will take by descent, as his better title, for the descent strengthens the title, by taking away the entry of such as may possibly have a right to the estate; whereas

Plowd. 545.
 1 Inst. 12 b.
 n. 2.
 2 Saund. R.
 7. note.

whereas if the heir takes by the devise, he is then only in by purchase.

§ 3. So if a person devises lands to his wife for life, remainder in fee to J. S. who is his heir at law, it is a void devise as to the remainder, because the reversion would have descended to J. S. after the determination of the particular estate.

Baspool's
Case,
2 Leon. 101.

§ 4. Although the devisor charges the estate with the payment of debts, or portions to his younger children, yet if he afterwards devises the estate to his heir at law in fee, it will be void and the heir will take by descent.

Though
charged with
Debts, &c.

§ 5. A person devised to each of his children 20 l. when they attained the age of twenty-one years; and devised all his estates to his eldest son, to hold to him and his heirs; upon condition he should pay to his other children the said sums appointed to them; and if he did not pay the same, then the lands to go to the younger children and their heirs. Adjudged that the eldest son took by descent.

Haynworth
v. Pretty,
Cro. Eliz.
833. 919.

§ 6. A person seised in fee devised lands to his wife for life, and after her decease to his next heir at law, and to his or her heirs; provided such heir should pay 1000 l. to such person or persons as his wife should appoint. It was resolved that the heir took by descent, and not by the will. And it would be mischievous if every little legacy should alter the course

Clark v.
Smith,
Com. Rep. 72.

of descent upon which the heir might plead to the obligation of the ancestor, *riens per descent*.

Allen v.
Heber,
1 Black. R.
22.

§ 7. Action of debt on the bond of the father to whom the defendant was heir. Plea *riens per descent*; the fact was, that the father had devised his lands to the defendant charged with debts. And the question was, whether this made him a purchaser.

The court said, if the tenure or quality of the estate be altered, the heir is a purchaser; but a charge on the estate does not alter the manner of the heir's taking the land. A devise is void, where it gives the same estate as would be taken by descent.

Judgment for the plaintiff.

Smith v.
Trigg,
1 Stra. 487.

§ 8. The same rule is applied to copyholds, and therefore a surrender of a copyhold to the use of a will, and a devise thereof to the heir at law, will not give the devisee an estate by purchase.

The Devisee
must be sole
Heir.

§ 9. The devisee must be sole heir to the lands devised, to render the devise void, for if he is only one of the heirs, he will take under the devise.

Reading v.
Royston,
1 Salk. 242.
2 Ld. Raym.
829.
Com. R. 123.

§ 10. *A. B.* having two daughters, one of them had issue a son and died. *A. B.* devised all his estate to this son of his daughter in fee; and the question was, whether the son should take all by this devise, or one moiety by descent, and the other by devise, for there could not be a descent of a moiety to one coparcener

cener as heir. One could not plead a descent *uni filia et cohæredi*, but it is a descent to all; and therefore it was resolved that the grandson took by the devise.

§ 11. Where an estate is devised by a will to an heir at law, different in point of quality from that which he would have taken by descent, the will shall prevail, and the devisee take under it as a purchaser. And therefore it is laid down in *Plowden*, that if a man devises his land to his son and heir, to have to him and the heirs of his body, this is a good devise, because it is another estate than he would have had by descent.

A Difference in the Estate renders the Devise good.

545.

§ 12. A person devised to his eldest son, and to his heirs and assigns, all other his real estate not before devised. Nevertheless, in case he should die without issue, not having attained twenty-one, then from and immediately after his death under age, and without issue, unto the testator's son *William*.

Scott v. Scott, Amb. 383.

Lord Keeper *Henley* after having taken time, gave his opinion that the eldest son took by devise, as having under the will a different estate than would have descended to him, the one being pure and absolute, the other not.

§ 13. An alteration in the quality of the estate will also have the same effect. Thus in *Mich. 37, 38 Eliz.* Lord *Coke* who was then Attorney General, demanded of the Court of King's Bench their opinion on this

Cro. Eliz. 431.

case. A man having two daughters being his heirs, devised his lands to them and their heirs, and died. Whether they should take as joint-tenants by the devise, or as coparceners by descent? And all the justices held clearly that they should have it as joint-tenants. For the devise gave it to them in another degree than the common law would have given it.

Beare's Case,
1 Leon. 112.

§ 14. In a formedon in the descender brought by *A. B.* and *C.* of lands in gavelkind, the warranty of their ancestor was pleaded in bar against them; upon which they were at issue, if assets by descent? It was found by verdict that the father of the demandants was seised in fee, being of the nature of gavelkind, and devised the same to the demandants, being his heir by the custom, and to their heirs equally to be divided amongst them; and if the demandants should be accounted in of the lands by descent or devise was the question? It was the opinion of the court, that they should be in by the devise; for they were now joint-tenants, and the survivor should have the whole; whereas, if the lands should be holden in law to have descended, they should be parceners, and so, as it were, tenants in common, and so by the opinion of the court, the warranty pleaded with assets was no bar.

Fearne's Op.
128.

§ 15. In an opinion of Mr. *Fearne's* which has been published, he says, that a devise to the heir and another, as tenants in common, will not prevent the heir's taking his moiety by descent. For suppose a testator devises a moiety or any other undivided share
of

of his real estate to a stranger, making no disposition at all of the remaining undivided share, such remaining share would of course descend to his heir at law, and he must hold it in common with the devisee of the undivided share devised. It was clear therefore that an heir might take by descent, as tenant in common with a devisee, an undivided part of the estate, which his ancestor was solely seised of, and it appeared to be immaterial whether the share he so takes is expressly devised to him, or left unnoticed by the will; for if expressly devised, he takes it in common, and if not noticed, he takes it in the same manner; and a devise to two or more as tenants in common, is in effect a devise of one undivided part to one, and of another undivided part to the other; so that under such a devise to an heir and a stranger as tenants in common, the heir takes as if one undivided moiety were devised to the stranger, and the residue to himself; that is, in the same manner as if no disposition at all of such residue had been expressed in the will, in which case he would have taken by descent; and therefore the same estate being devised to him in such residue, as he would have taken by descent, the general rule respecting devises to an heir, extends to it,

Vide infra,
ch. 15.

§ 16. In consequence of the statute 9 Geo. 2. c. 36. all devises and bequests of lands and tenements, or of any sums of money to be laid out in the purchase of lands and tenements for any charitable uses whatsoever are void.

2d. Devises to
charitable
Uses.
Tit. 32.
ch. 2. f. 32.

3d. Where
there has been
Fraud,

Kerrick v.
Bransby,
7 Bro. Par.
Ca. 437.
Webb v.
Claverdon,
2 Atk. 424.

§ 17. The third case in which a devise is void *ab initio* is where any fraud or circumvention has been practised on the testator, or where he was incapable of making a will from weakness of mind. But if the validity of a will is impeached on these grounds a court of equity will not set it aside, but will direct a trial at law on the issue of *deviseavit vel non*; for if the will be obtained by fraud, or be made by a person incapable of devising, it is not in point of law the testator's will; and therefore these points are proper to be tried before a jury.

Doc v. Allen,
8 Term. R.
147.

§ 18. It was determined in a modern case that in order to set aside a will for fraud, parol evidence might be given of questions asked by the testator at the time of executing his will, whether the contents were the same as those of a former will.

4th. Where
the Devisee
dies before the
Devisor.

Domat, V. 2.
p. 98.

§ 19. With respect to the case where a devise becomes void by an event subsequent to the making of the will; it is a rule that if the devisee dies before the devisor, the devise becomes void. This doctrine was probably adopted from the rule of the civil law, *pro non scriptis sunt iis relicta qui vivo testatore decedunt*.

Brett v.
Rigden,
Plow. 341.

§ 20. *A.* devised lands to *B.* and his heirs; *B.* died in the lifetime of the testator. Afterwards the testator told the heir of *B.* that he should have the land which he had devised to *B.* The question was, whether the heir of *B.* should take any thing by this devise. It was determined that he should not, for it was a principle of law that in all gifts, whether by devise or otherwise, there

there ought to be a person *in esse* capable of taking at the time the gift vests, and as the thing devised cannot vest till the death of the devisor, at which time the devisee was dead, it followed that he could take nothing by the devise. As to the word heirs being inserted in the devise, it was only used as a word of limitation, to denote the quantity of estate which the devisor meant to give, and not with an intention to describe the heirs of *B.* or to give them any thing.

§ 21. *Henry Fuller* having issue four sons, *John, Richard, Edward,* and *Henry*, devised lands to his second son and the heirs of his body, and after his death without issue, then to his third son. The second son died in the lifetime of his father; and it was adjudged that the issue of the second son took nothing by the devise, it being lapsed, but that the third son might enter.

Fuller v.
Fuller,
Cro.Eliz.422.

§ 22. *Thomas Addison* having two daughters, devised all his estates to his second daughter and the heirs of her body begotten, and for want of such issue, to his eldest daughter. The second daughter died in the lifetime of the testator, leaving a son. Adjudged that the devise to the second daughter became void by her dying in the lifetime of the testator, and that her son could not take as heir of her body.

Hutton v.
Simpson,
2 Vern. 722.

§ 23. *Robert Wynn* devised his estate to his brother *Maurice Wynn* and the heirs male of his body, remainder to *Owen Wynn* and the heirs male of his body; *Maurice* and *Owen Wynn* died in the lifetime

Wynn v.
Wynn,
3 Bro. Parl.
Ca. 95.

of the testator, but *Owen Wynn* left an only son who claimed under the devise. It was resolved that the son of *Owen Wynn* took nothing.

Goodright v. Wright,
1 P.Wm 397.
1 Stra. 25.
10 Mod. 370.

§ 24. One seised in fee devised lands to *A.* and his issue, remainder to *B.* and his issue, remainder to the heirs of *A.*—*A.* died without issue in the lifetime of the testator, and *B.* died in the lifetime of the testator, leaving issue the defendant who was also the heir of *A.*; and the plaintiff was the heir of the testator. The question was, “whether, as the devisees *A.* and *B.* both died in the lifetime of the testator, the issue of *B.*, who was born after the will was made, and so could not take jointly with the devisees, could take either as the heir of the body of *B.* or as right heir of *A.*”

Lord Chief Justice *Parker* delivered the unanimous opinion of the court, that this case was exactly within the reason of the case of *Brett v. Rigden*, 1st, Because as well in this case the word “*issue*,” as in that the word “*heirs*,” was clearly used as a word of limitation, viz. to measure out the quantity of estate that the devisee was to take, and not as a word of purchase; the devisee only being in the view and consideration of the testator, and the words “*heir*,” or “*issue*,” mentioned for nothing else but to limit what estate the devisee should take.

Hodgson v. Ambrose,
Doug. 337.
Infra, ch. 14.

Warner v. White,
3 Bro. Parl.
Ca. 435.

§ 25. *Richard White* being seised in fee of several estates in the county of *Cork*, and having issue *Simon White* his eldest son, and *Hamilton White* his second son,

son, devised all his lands in *Bantry* to his eldest son *Simon White* and the heirs of his body lawfully begotten; and, for default of issue of his said son *Simon*, then he devised his said estate to his son *Hamilton White*, and the heirs of his body.

Simon White died in the lifetime of his father, leaving issue four sons and four daughters. The question was, whether the eldest son of *Simon White* took any thing by this devise, or whether it lapsed to *Hamilton White* the person next in remainder.

The Court of King's Bench in *Ireland* determined, that the eldest son of *Simon White* should take under this devise; but this judgment was reversed in the Court of King's Bench in *England*. A writ of error was then brought in the House of Lords; and it was argued on behalf of the eldest son of *Simon White*, that he ought to take under this devise, 1st, Because it was plain that the testator did not mean to exclude the issue of his eldest son from the inheritance, the children of *Simon* being alive, and known to the testator, at the time he made the devise to *Simon* and the heirs of his body. 2d, Because the remainder to *Hamilton White* was expressly limited to take effect, only in default of issue of the testator's son *Simon*; and no devise was made of the estate until such default should happen; and it is a principle in law, that the heir shall take every thing which is not devised from him. 3d, Because courts of justice have been always anxious to effectuate the intentions of testators, where they are not contrary to the rules of law, or settled

settled authorities ; and there was no case to be found in which it had been adjudged, that a devise to a man and the heirs of his body lapsed for the benefit of a person in remainder, from the circumstance of the first devisee dying in the testator's life time, where it appeared that the heir of the body of the first devisee was likewise heir at law of the testator.

On the other side it was contended, that, by the established rules of law, the devise to *Simon* became void by his death in the lifetime of the testator, and the remainder to *Hamilton* the second son, took effect immediately on his father's death. That the doctrine had been adopted in early times, and had continued down to the present. It was established in the early part of the reign of Queen *Elizabeth*, and was recognized in a variety of cases down to the year 1780 ; nor was it ever judicially contradicted or impeached. But there appeared at the end of the report of *Fuller v. Fuller*, Cro. Eliz. 422. a *dictum* of Lord Chief Justice *Popham*, that where a devise was to a son in tail, his issue, in case of his death in the lifetime of his father, should take before the remainder-man. But this at most was an extra-judicial opinion, and was not admitted in the case of *Hodgson v. Ambrose*.

Infra, ch. 14.

After counsel had been heard in this case, the following question was put to the Judges ;—" Whether, " in the event that had happened, the defendant " *Hamilton White* took any and what estate in the " lands of *Bantry*, under the devise to him, for default of issue of *Simon White*."

The

The Chief Baron delivered the unanimous opinion of the Judges present, that *Hamilton White* took an estate tail; and the judgement of the Court of King's Bench in *England* was affirmed.

§ 26. A republication of a will after the death of a devisee in tail will not give any estate to the issue of the devisee.

§ 27. *N. Goddard* devised lands to her god-daughter and the heirs of her body, who died in the lifetime of the testatrix, leaving a son. The deviser knew of the death of the devisee and of the birth of her son, after which she made a codicil which operated as a republication of her will. It was determined that the devise having become void by the death of the devisee, did not operate by its republication so as to give any estate to the son of the devisee.

Doe v. Kett,
4 Term R.
601.

§ 28. Where it is impossible to discover from the words of a will, to whom the estate is given, the will is void for uncertainty.

5th. Uncertainty.
Thomas v. Thomas,
Infra.

TITLE XXXVIII.

DEVISE.

CHAP. IX.

Of the Construction of Devises.—General Rules.

- | | |
|--|---|
| <p>§ 1. <i>No particular Form necessary.</i>
 4. <i>Rules of Construction.</i>
 17. <i>A Perpetuity cannot be created by Will.</i>
 18. <i>Construction Cy Pres.</i></p> | <p>22. <i>Contradictory Devises.</i>
 23. <i>No Averment allowed to explain Wills.</i>
 26. <i>Exception where there is a latent Ambiguity.</i></p> |
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Section 1.

No particular
Form neces-
sary.

3 P.Wms. 27.

A WILL being considered as a disposition made at a time when the testator cannot have the assistance of persons skilled in the law, or, as it is usually expressed, when he is *inops consilii*, the Judges have at all times held, that a will shall not be construed strictly like a deed, but that the intencion of the testator, though not expressed in the proper legal and technical words, shall, notwithstanding, be carried into effect; it being a maxim of the *English* law, *quod ultima voluntas testatoris perimplenda est secundum veram intencionem*. The law has, therefore, not prescribed any particular form, in which a devise or will of lands must be made; so that any writing, by which the intencion of a person appears, to give or dispose of his lands after his decease, though in the form of a deed, will be considered as a good devise.

§ 2. *Clement*

§ 2. *Clement Witham*, by indenture made between him of the one part, and *Orbell* and *Skin* of the other part, declared his intention to raise portions for his children, and to pay his debts, and thereby settled his lands on *Orbell* and *Skin*, in trust to sell the same, &c. and made them executors to the uses aforesaid; and signed, sealed, published, and declared this to be his last will, in the presence of several witnesses. The Court of Chancery declared this to be a good will.

Hickson v. Witham,
Finch. R. 195.
Green v. Proude,
1 Mod. 117.

Clymer v. Littler, 1 Bla. R. 345.

§ 3. In the case of *Habergham v. Vincent*, Lord *Loughborough*, Mr. Justice *Buller*, and Mr. Justice *Wilson*, held, that the deed poll being intended to operate after the testator's death, was testamentary; and, though void as to the freehold, for want of three witnesses, passed the copyhold.

Ante c. 5.
f. 47.

§ 4. No technical words are necessary to convey a testator's meaning, and, whenever that is doubtful, it must be collected from the scope of the whole will, compared with its several parts; for Courts of Justice cannot make a will for the party, nor interpret it by any arbitrary construction. But that mode of expression is to be preferred, which gives effect to every part of the will, so that each word may have its particular operation, and not be rejected, if any construction can possibly be put upon it.

Rules of Construction.

2 Burr. 770.

2 P. Wm. 282.

§ 5. The intention of the testator is to be collected from the whole will, *ex visceribus testamenti*, so as to leave the mind quite satisfied about what the testator meant; and, as a will of lands must be in writing, such

3 Burr. 1541.

such collection of the testator's intention must be derived from the will itself, for no averment or parol evidence can be admitted to explain any thing dubious upon the face of the will, except in a few instances, which will be mentioned hereafter.

§ 6. General words in one part of a will may be restrained by subsequent words, and shall be construed so as not to defeat the intention of the testator, to be collected from any other part of the will. But, where there is a manifest general intent, the construction should be such as to effectuate it, though, by that construction, some particular intent may be defeated.

1 Burr. 38.

4 Term R.

82.

8 Term R. 5.

1 P.Wm. 286.

4 Bro. R. 441.

§ 7. The situation of a testator, the number of his children, and the different kinds of property whereof he was seised, at the time of making his will, are circumstances from which arguments may be drawn respecting his intention. And it has been determined, that the same words may have a different construction when applied to different kinds of property.

2 Vef. 616.

Dee v. Fyldes,

Cowp. 833.

2 Burr. 1108.

Doug. 341.

§ 8. The construction ought to be such; that the intent of the testator may be rendered consistent with the rules of law; for, otherwise, every man would make a new law to himself, the metes and bounds of property would be vague and indeterminate, which would end in its total insecurity.

2 P.Wm. 741.

Doug. 341.

§ 9. Technical words are presumed to be used in the sense which the law has appropriated to them, unless the contrary appears. But where the intention of the

testator

testator is plain, it will be allowed to control the legal operation of the words, however technical.

§ 10. Introductory words often assist in shewing the intention of a testator; and, in such cases, the courts have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it.

Cowp. R.
306. 637.

§ 11. An heir at law shall not be disinherited by a will, unless there are express words, or a necessary implication; for the title of the heir is founded on the laws of descent, which are certain, and is therefore not to be defeated by an uncertain devise.

Prec. in Cha.
473.
Cowp. R. 99.

§ 12. A dubious expression in a will may be explained by a codicil, or schedule annexed to such will.

Hayes v.
Foord, *infra*.

§ 13. Declarations of trusts executed, contained in a will, are construed in the same manner as devises of legal estates; but, where a conveyance or settlement is directed to be made, a court of equity will construe the will more liberally, in order to effectuate the intention of the testator.

Vide Tit. 32.
ch. 23. f. 32.
Treat. of Eq.
B. 1. c. 6. f. 8.

§ 14. In the construction of wills, adjudged cases may be argued from, if they establish general rules of construction, to find out the intention of the testator. And where once a court of justice has determined the meaning of certain words, or forms of expression, the same effect will in all future cases be annexed to them;
for

1 Burr. 233.

Doug. 340.

for the great object, in questions of property, is certainty: and Lord *Mansfield* has observed, that if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it than if it were to be overturned.

Law Tracts
295.
Vide *Fearne*
Cont. Rem.
266.

Vide *Thompson v. Lawley*,
infra.

§ 15. Mr. *Hargrave* has justly observed, that if courts either of law or equity (in both of which the rules of interpretation must be the same) should indulge an unlimited latitude of forming conjectures upon wills, instead of attending to their grammatical or legal construction, the consequence must be endless litigation. Every title to an estate that depends upon a will must be brought into *Westminster Hall*; for, if once we depart from the established rules of interpretation, without a moral certainty that the meaning of the testator requires it, no interpretation can be safe, till it has received the sanction of a court of justice; for, how can a client or a purchaser be assured that the conjectures of the most able counsel, or the most experienced conveyancer, will be in all points the same as the conjectures of the Judges or the Chancellor.

5 Term R.
561. 8 Term
R. 502.

§ 16. In a modern case, Lord *Kenyon* said, “ Had
“ there not been such a current of authorities as we find
“ in the books since the passing of the statute of wills,
“ on the construction of wills, to further (as it has
“ been called) the intentions of devisors, perhaps it
“ would have been better that the same strict words
“ had been required in testamentary dispositions of
“ land as in those by deed; because then the language
“ of passing estates would have been so familiar, that
“ few

“ few questions would have arisen on wills. For it
 “ has been often observed, that few questions arise on
 “ the construction of deeds, when compared to those
 “ which daily arise on wills. But we are bound to
 “ consider the series of authorities on this subject as
 “ the law of the land ; and it would be extremely
 “ dangerous now to remove those land-marks of real
 “ property, on which mankind have acted for such a
 “ length of time.”

§ 17. The general principles which have been stated in Title 32. ch. 26. respecting perpetuities, are as fully adopted in the construction of wills, as in that of deeds. It may, therefore, be laid down, that lands cannot be devised in such a manner as to render them unalienable for a longer period than a life or lives in being, and twenty-one years and nine months after.

A Perpetuity cannot be created by Will.
 Willes R. 164.
 Seaward v. Willock,
 5 East. R. 198.

§ 18. There is, however, a difference, in cases of this kind, between a deed and a will ; for, in the case of a deed, all the limitations are totally void. But, in the case of wills, the courts do not, if they can avoid it, construe the devise to be utterly void, but expound the will in such a manner as to carry the testator's intention into effect, as far as the rules respecting perpetuities will allow, which is called *a construction cy pres.*

Construction *Cy pres.*

§ 19. A person devised his estate to the drapers company and their successors, in trust to convey the premises to his godson *M. H.* for life, and, upon the death of the said *M. H.* to his first son for life, and so

Humberston v. Humberston, 1 P. Wms. 332.

to the first son of that son for life, &c. ; and if no issue male of the first son, then to the second son of the said *M. H.* for life, and so to his first son, &c. On a bill brought for an execution of the trusts of this will, Lord *Cowper* said, “ Though an attempt to make a
 “ perpetuity for successive lives be vain, yet, so far as
 “ is consistent with the rules of law, it ought to be
 “ complied with ; and, therefore, let all the sons of
 “ these several *Humberstons* that are already born, take
 “ estates for their lives, but, where the limitation is to
 “ the first son unborn, there the limitation to such un-
 “ born son shall be in tail male.”

Pitt v. Jack-
 son, 2 Bro.
 R. 51.

§ 20. So, where there is a proviso in a will, the effect of which would be to prevent a power of alienation for a longer period than the law allows, such proviso will be deemed void, and the rest of the will good,

Lade v. Hol-
 ford, 3 Burr.
 1416. Black.
 R. 428.
 Amb. 479.

§ 21. Sir *John Lade* devised certain lands to trustees and their heirs to the use of his cousin *John Inskip* for life, remainder to trustees to preserve contingent remainders ; remainder to his first and other sons in tail male ; remainder to the use of the trustees and their heirs during the life of *Ann Nutt*, in trust to apply the rents and profits for the benefit of such of her sons, or such other person, as for the time being should be *in esse*, and would be the next tenant for life or in tail, by virtue of the limitations in his will, in case *Ann Nutt* were dead, and from and after her decease, then to the use of her first and other sons successively in tail : provided, that during the time the said *John Inskip* should

should be under the age of twenty-six, and so often and during such time as the person who for the time being would, by virtue of the said will, have been entitled in possession to the devised premises as tenant for life, or tenant in tail, should be under the age of twenty-six years, the trustees and their heirs should and might enter on the premises, and take the rents and profits, and apply them to the following uses; *viz.* to allow such person till the age of fourteen 50 *l. per annum*, till eighteen 100 *l.*, till twenty-one 300 *l.*, and till twenty-six 1000 *l.*, and the residue to be disposed of as the residue of the testator's personal estate was thereby directed to be disposed of, *viz.* to be laid out in lands, and settled as the estate before devised. *John Inskip* died, leaving his wife enſient with a son, who while an infant exhibited his bill in Chancery, praying to be let into possession of the estate when he should arrive at the age of twenty-one. Lord *Henley* directed a case to be sent to the Court of King's Bench for their opinion on this question; Whether *Rose Fuller*, the heir of the surviving trustee, did, upon the birth of the present plaintiff, take any, and what estate in the devised premises, by virtue of the said proviso? It was contended, that no estate vested in the trustees, the proviso being void; whether it meant to vest a determinable fee in the trustees, or a mere chattel interest; because, in the first case, it tended to a perpetuity, by taking away the power of alienation five years longer than the policy of the law admitted: in the latter case, it had the same inconvenience, and was in derogation of the legal powers of tenant in tail.

The Court of King's Bench appear to have been of this opinion, for they certified, that *Rose Fuller*, the heir at law of the surviving trustee in the will of Sir *John Lade*, did not take any estate in the premises devised, by virtue of the proviso in the will of the said testator.

Contradictory
Devises,
1 Inst. 112 b.
" 1.

Plow. 451.
Owen 84.

§ 22. Lord *Coke* says, that where there are two different devises of the same thing, the last shall take place. Mr. *Hargrave* observes, that there is a great contrariety of opinion on this subject; some hold with Lord *Coke*, that the second devise revokes the first; others think, that both devises are void, on account of the repugnancy: but the opinion supported by the greatest number of authorities, is, that the two devisees shall take in moieties.

No Averment
allowed to
explain Wills.

Plowd. 345.

§ 23. By the statute of frauds, it is enacted, " That
" no will in writing shall be repealed, nor shall any
" clause, devise, or bequest therein, be altered or
" changed by any words, or will, by word of mouth
" only." In consequence of these words, no parol
averment can be admitted to explain a will, contrary
to the import of the words of such will.

Bertie v. Ld.
Faulkland,
Salk. 231.

§ 24. Papers and other writings were offered in evidence, to prove what was said to be the intention of the testator. It was decreed, that they should not influence the construction of a will in writing; for that would be to make them part of the will itself: and it is expressly required by the statute of frauds and perjuries, that every part of a will shall be in writing;

and, even before that statute, no collateral proof, either by papers or words, was admitted; because a will is a consummate act of itself.

§ 25. The deposition of a person, who prepared a will, was offered to be read to prove the declarations of the testator, at the time he gave the instructions for the will, with respect to his intention of giving his wife the several devises and bequests, mentioned in the will, over and above her jointure. But Lord Chancellor *Bathurst* would not suffer such evidence to be read.

Broughton v. Errington,
7 Bro. Parl.
Ca. 461.

8 Ves. Jun. 22.

§ 26. But, in the case of an *ambiguitas latens*, an averment supported by parol evidence is admissible, to explain a will; and, therefore, if a testator having two sons of the name of *John*, devises generally to his son *John*, there parol evidence will be admitted, to prove which *John* the testator meant.

Exception
where there is
a latent Am-
biguity.
5 Rep. 68 b.
2 Atk. 372.

§ 27. A person, being seized in fee as heir of his mother's mother, devised the land to trustees in fee, in trust to pay annuities, and the residue to go to the testator's right heirs, of his mother's side, for ever. The testator had two heirs of the mother's side; one who was heir of the mother's father, and the other, heir of his mother's mother. Parol evidence was admitted, to prove that the testator, when he made his will, declared that the heir of his mother's mother should have his estate, because it came from thence.

Harris v. Ep.
Lincoln, 2 P.
Wms. 135.

§ 28. Where parol averments are allowed to explain a will, they may be encountered by parol averments.

Jones v.
Newman,
1 Bla. R. 60.

§ 29. On a motion for a new trial in ejectment, wherein the lessor of the plaintiff was heir at law, and the defendant's title arose upon a will, which devised the premises to *John Cluer* of *Calcot*, under whom the defendant claimed; but the plaintiff gave evidence that, at the time of making the will, there were two *John Cluers*, father and son; and that, therefore, the devise was to the father, who died before the testatrix, and so the devise was lapsed. Upon which, the defendant offered to prove by parol evidence, that the testatrix intended to leave it to *John Cluer* the son; but the judge would not suffer it, and a verdict was found for the plaintiff. But, *per totam curiam*, the judge was mistaken: the objection arose from parol evidence, and ought to be encountered by the same.

Thomas v.
Thomas,
6 Term R.
671.

§ 30. *George Evans* devised to his granddaughter *Mary Thomas* of *Llechblyd* in *Mertbyr* parish, the reversion of a house, the said house to continue in the possession of his wife *Elizabeth Evans* during her widowhood. At the time of his death, the devisor had a granddaughter of the name of *Elenor Evans*, who lived at *Llechblyd* in *Mertbyr* parish, and a great-grand-daughter *Mary Thomas*, an infant of two years, being the only person of that name in the family; but it appeared that she lived at *Green Castle* in the parish of *Llangain*, some miles from *Mertbyr* parish, in which latter parish she had never been in her life.

At the trial, the plaintiff's counsel proposed giving parol evidence to shew a mistake in the name of the devisee, that when the will was read over to the devisor
by

by *Phillips* the person who drew it, and who was dead, the devisor said that there was a mistake in the name of the woman to whom the house was given; that *Phillips* then said he would rectify it; but the devisor answered, that there was no occasion, as the place of abode and the parish would be sufficient. To this evidence, the defendant's counsel objected, contending, that there was not that *ambiguitas latens* which authorized the receiving of parol evidence. That if the doubt had arisen from there being two persons of the name of *Mary Thomas*, parol evidence might be admitted to explain which of them was meant; but, here, the inaccuracy of the description was not such as to raise a sufficient degree of doubt to let in the parol evidence, for grand-daughter would properly enough signify great-grand-daughter, and the mistake of the residence was only in a matter of description which was perpetually varying, and could not raise any doubt where a name not applicable to any other than the defendant was used, which was a circumstance of the greatest weight in these cases. Mr. Justice *Lawrence* received the evidence, subject to the opinion of the court on its admissibility, in case the jury should be of opinion that the name *Mary Thomas* had by mistake been inserted instead of *Elinor Evans*. But the jury being of opinion, that there was no such mistake, they found for the defendant *Mary Thomas*, and, consequently, any farther consideration of this point became unnecessary. The defendant's counsel then offered evidence of declarations made by the devisor at other times previous to the making of his will, expressive of his regard for his great-grand-daughter the defendant, and of his in-

tention of giving her the house in question. This evidence was rejected by the judge, who thought that nothing *debors* the will could be received to shew the intention of the devisor, which could only be collected from the words of the will itself, after the removal of any latent ambiguity there might be in the description of persons, or other terms made use of in the will. And the jury found for the heir at law, on the ground that the will was void for uncertainty.

Upon a question, whether a new trial should be granted, Lord *Kenyon* said, “ Although great pains
 “ have been taken by the counsel on both sides, to in-
 “ vestigate the points in this cause, it seems to be a
 “ case of no difficulty. It must be admitted, that the
 “ heirs at law are not to be disinherited by conjecture,
 “ but only by express words or necessary implication.
 “ When the rule for a new trial was moved for, I al-
 “ luded to the maxim that *falsa demonstratio non nocet*,
 “ but, in doing so, I wished that the sense of that rule
 “ should be attended to: I have always understood,
 “ that such *falsa demonstratio* should be superadded to
 “ that, which was sufficiently certain before: there
 “ must be *constat de personâ*, and, if to that an inapt
 “ description be added, though false, it will not avoid
 “ the devise. And this gets rid of almost all the ob-
 “ servations and arguments made by the defendant’s
 “ counsel; for, in the case cited, there was no other
 “ person in competition with the person claiming. It
 “ has been a long established rule, that where there is
 “ a latent ambiguity in a will, the parties may go into
 “ extrinsic evidence to render that certain, which,
 “ without

“ without the aid of such evidence, is uncertain. But
 “ here, the evidence given, has itself raised the ambi-
 “ guity. On the face of the will there is no uncer-
 “ tainty; one person, namely, *E. Evans*, is named,
 “ who is the grand-daughter of the devisor, and of
 “ *Llechlloyd* in *Merthyr* parish. Two of the descrip-
 “ tions, therefore, in the contested devise, apply to
 “ her; but, instead of her name, (it was said), that
 “ of *Mary Thomas* was inserted; it turns out, that
 “ *Mary Thomas* is not the grand-daughter, but the
 “ great-grand-daughter of the devisor, and that she
 “ does not live at *Llechlloyd* in *Merthyr* parish, the
 “ place mentioned in this clause. Then do we arrive
 “ at any certainty respecting the person of the devisee?
 “ If we do, it must decide the case; but if the parol
 “ evidence has introduced uncertainty respecting the
 “ devisee, then the heirs at law must take. In addi-
 “ tion to the cases that were cited, another in *P. Wil-*
 “ *liams* might have been referred to, where the name
 “ of the legatee was mistaken: the testator gave a
 “ legacy to *Catherine*; it turned out, that there was
 “ a person whom he frequently called *Gatty*, and not
 “ according to her real name, which was *Gertrude*;
 “ and, when parol evidence of that was received, it
 “ left no doubt but that the testator meant *Gatty*. So,
 “ here it was proper to let in the parol evidence to re-
 “ move the latent ambiguity; but, when received, it
 “ leaves the question in uncertainty. If there had
 “ been no person answering the description of grand-
 “ daughter, living at *Llechlloyd* in *Merthyr* parish, I
 “ should have rejected the description, and have said,
 “ that the devise applied to *Mary Thomas*: but it ap-
 “ pears,

Beaumont v.
 Fell, 2 P.
 Wms. 141.

“ pears, that there is another person answering that
 “ part of the description, who is also an object of the
 “ testator’s bounty. Then, as there are two parts of
 “ the description not answering to *Mary Thomas*, who
 “ is named in this clause in the will, we are left to
 “ conjecture who was meant by the devisor : but the
 “ law will not allow an heir at law to be disinherited
 “ by conjecture.

“ With regard to the other question respecting the
 “ rejection of evidence, it seems that the learned judge
 “ did right in rejecting it, the supposed declarations
 “ having been made by the testator long before the
 “ will was made ; though, had they been made at the
 “ time of making the will, I should have thought them
 “ admissible in evidence.”

Asburst Justice.— “ The heirs at law must recover
 “ possession of this estate, unless some other person be
 “ clearly and unequivocally entitled to take under the
 “ will. I cannot form any satisfactory opinion respect-
 “ ing the person, who the devisor intended should take
 “ under the devise in question, and, therefore, the title
 “ of the heirs at law must prevail.”

Grose Justice.— “ The heirs at law cannot be disin-
 “ herited, unless we find some person named in the
 “ will that the devisor intended clearly should take :
 “ then, can we clearly discover whom the devisor meant
 “ in the clause in question ? He had no grand-daugh-
 “ ter, but he had a great-grand-daughter, of the name
 “ of *Mary Thomas* ; and though, under certain cir-
 “ cumstances,

“ circumstances, a great-grand-daughter may take under
 “ the description of grand-daughter, if there be no
 “ doubt about the person intended, yet here the grand-
 “ daughter is described as living at *Llechlloyd* in *Mer-*
 “ *thyr* parish: this raises a considerable doubt respect-
 “ ing the person intended; and when it appears by the
 “ evidence given, that the deviser had a grand-daugh-
 “ ter living in that parish, but no great-grand-daugh-
 “ ter, it renders it still more doubtful, whether he
 “ meant to give the house to *Mary Thomas* the grand-
 “ daughter. Then, we are left to conjecture who was
 “ meant in this clause, there being no person answer-
 “ ing to the descriptions; but, it being uncertain, the
 “ heirs at law are entitled to take the advantage. As
 “ to the rejection of the evidence offered, the question
 “ was, what the deviser intended at the time of mak-
 “ ing his will, not what he *had* intended; and, as the
 “ evidence tendered would only have proved that he
 “ had had such intention, I think it was properly
 “ rejected.”

Lawrence Justice.— “ I received parol evidence for
 “ one purpose, and rejected it for another, on this
 “ ground: I thought that I could not receive parol
 “ evidence of declarations of the testator, relative to
 “ his intention, made before the will, but that parol
 “ evidence might be received to remove a latent am-
 “ biguity, not appearing on the face of the will, or to
 “ clear up a mistake of a name in the will. As the
 “ description in the clause in question answered to
 “ *E. Evans*, and as it was stated that the deviser, at
 “ the time of making his will, said, that he meant that

“ *E. Evans* should take under it, I permitted the coun-
 “ sel for the plaintiffs to go into parol evidence, to see
 “ whether or not the name of *Mary Thomas* were by
 “ mistake inserted for that of *E. Evans*: and, in so
 “ doing, I found myself warranted by former decisions,
 “ 8 *Vin. Ab.* 312. *pl.* 29. and 2 *Vesf.* 216. With re-
 “ gard to the evidence which was rejected, I thought
 “ that a will could not be construed by any declara-
 “ rations, made by the testator before the making of
 “ the will, but that his intention must be collected
 “ from the words of the will, or from what passed at
 “ the time of making it. There is no doubt, but that
 “ parol evidence to remove the latent ambiguity in the
 “ will was properly received; but, when it was receiv-
 “ ed, it became extremely doubtful who was intended
 “ to take. I perfectly agree in the opinion given by my
 “ Lord Chief Justice on this point: if the parol evi-
 “ dence had clearly shewn who was intended to take,
 “ that person would have been entitled to our judg-
 “ ment; but if the parol evidence does not remove,
 “ but raises, the doubt, then the title of the heirs at
 “ law must prevail. In many cases, the description of
 “ the devisee is of importance: suppose a devise of a
 “ house to *A.* by name, on condition that he keep up
 “ the house, &c. and it turned out, that *A.* was of
 “ too tender age to keep house, the person so named
 “ could not take, because it is evident from the de-
 “ scription, that the deviser did not mean that person
 “ so named. The cases cited only apply to a case,
 “ where there is only one person respecting whom the
 “ ambiguity arises; if that had been the case here, if
 “ there had been no person answering the description
 “ in

“ in this clause, *Mary Thomas*, who is named, might
“ have taken, and the description might have been
“ rejected : but here the description, both as to the
“ degree of relationship, and as to the place of resi-
“ dence, does apply to another person ; therefore, it
“ is uncertain whom the devisor meant, and, conse-
“ quently, the heirs at law must take.”

TITLE XXXVIII.

DEVISE.

CHAP. X.

Construction.—What Words create a Devise, and describe the Devisees, and the Things devised.

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Section 1.

HAVING stated the general rules by which wills are construed; it will now be necessary to enquire, 1st, What words are necessary to create a devise; 2d, What words are necessary to describe the devisees; 3d, What words are necessary to describe the property intended to be devised: and, 4th, What words are necessary to denote the quantity and nature of the estate intended to be devised.

§ 2. With

§ 2. With respect to the words necessary to create a devise of lands, the proper and technical words are, *give* and *devise*, but any other words which sufficiently shew the Intention of the testator to give all or any part of his estate, will be sufficient for that purpose.

What Words
create a
Devise.

§ 3. A person having conveyed his estate to feoffees to his own use, before the statute of uses, made his will after that statute, and also after the statute of wills by which he willed that his feoffees should make an estate to *W. N.* and the heirs of his body. This was adjudged to be a good devise of an estate tail to *W. N.* the intention being clear.

Bro. Ab. Tit.
Devise, pl. 48.

§ 4. *A.* seised of lands in fee, having issue two sons *B.* and *C.* made his will, by which he devised several lands to *B.* his eldest son; and directed that *B.* should renounce all his right in *Blackacre*, of which the devisor was then seised, to *C.* This was adjudged to amount to a devise to *C.* in fee.

Hodgkinson
v. Star, cited
1 Ld. Raym.
127.

§ 5. a mere recital in a will does not operate as a devise. And therefore in a case where a person being tenant for life, remainder to his wife for life, remainder to his own right heirs, made his will, in which he said—"My lands, by *Woolwich*, my wife " is to enjoy for her life, after her death of right " it goeth to my daughter *Elizabeth* for ever, provided she hath heirs."—It was determined that nothing was devised to *Elizabeth* the daughter, for the will did not give her any estate, but only recited the estate she had before.

Right v.
Hammond,
1 Com. R.
231.

Words of
Advice or
Desire.

§ 6. Words of advice, recommendation, or desire, will not create an actual devise. Nor will they even operate so as to raise a trust in equity, unless the property is certain, and the persons to whom it is given clearly described; and even in that case such words are not in general deemed imperative or legatary, where they are inconsistent with the antecedent right or interest, devised to that person to whom they are addressed; for in such cases the subject matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use his subsequent words of recommendation in a legatary sense, which would be to construe his will as inconsistent with itself, in one and the same sentence.

Anon 8 Vin.
Ab. 71. pl. 25.
S. P. Palmer
v. Schribb,
8 Vin. Ab.
288.

§ 7. A person gave all his estate to his wife, and then said, “I desire and request my said wife to give
“all her estate, which she shall have at the time of
“her death, to her and my nearest relations, equally
“among them.”

Lord *Harcourt* said, the words of the will being so very general, both with respect to the money, and the persons to take it, it did not amount to a devise, but was only a recommendation to the wife, to make such a disposition. But, if he had desired that she should have given it to a particular person, it would have been a good devise, and a trust.

Cunliffe v.
Cunliffe,
Proc. in Cha.
201.

§ 8. Sir *E. Cunliffe* devised certain sugar-houses, and stock in trade, unto his son Sir *E. Cunliffe* the plaintiff's

plaintiff's brother; nevertheless, in case Sir *E.* should die without a son, he *recommended* it to him to give and devise the said premises unto the said plaintiff. It was held by the Lords Commissioners *Aston* and *Smithe*, that the word *recommend* was not sufficient to raise a trust in favour of the plaintiff.

§ 9. A testatrix gave her fortune to *A.*; and, if he should die without issue, she *recommended* it to him to do justice to *B.* and her children, if he should think them worthy of it; but, if any unforeseen accident should make the whole or any part acceptable or serviceable to him, he might dispose of it, if he should think fit.

Le Maître v. Bannister, Prec. in Cha. 201 n.

It was held to be no trust.

§ 10. Lady *Bland* devised to her son, Sir *John Bland*, his heirs, executors, administrators, and assigns, all her manor of *Withington*, and other real and personal estate whatsoever; adding the following clause—
“ And it is my earnest request to my son, in case of
“ failure of issue of his body, that my son would in
“ his lifetime settle the said estate, or so much thereof
“ as he should stand seised of at his death, that the
“ same may come to and be enjoyed by my daughter,
“ and the heirs of her body,” and in failure of issue with divers remainders over; and made her son executor. It was held by Lord *Hardwicke* to be no trust, inasmuch as the words, “ so much as he should stand
“ seised of,” gave him the absolute ownership; and the other expression amounted to nothing more than

Bland v. Bland, Prec. in Cha. 201 n.

words of recommendation, leaving it to the discretion of the party whether he would comply with her request or not.

Harland v.
Trigg,
1 Bro. R. 142.

§ 11. *Richard Harland*, being seised in fee of the manor of *Sutton*, devised it to his eldest son *Philip* for life, with remainder to his first and other sons in tail male.

Philip entered upon the estate thus devised to him ; and, being himself also possessed of leasehold estates in *Sutton*, some for lives and others for years, by his will gave his leasehold estate for lives to the trustees of his father's will, to the same uses, to which the lands devised by the father's will were limited, so far as by law he could ; and then followed this clause—
“ And all my other leasehold estates, in the parish or
“ township of *Sutton*, I give to my brother. *John*
“ *Harland* for ever, hoping he will continue them in
“ the family.”

Lord *Thurlow* was of opinion, that the will in this instance did not import a devise, as the words did not clearly demonstrate an object.

Wynne v.
Hawkins,
1 Bro. R. 179.

§ 12. The words, “ not doubting but that she (the devisee) will dispose of what shall be left at her death to our two grandchildren” were decreed not to amount to a devise.

§ 13. Notwithstanding the authority of the preceding determinations, there are some cases, in which words

words of desire or request have been held to be imperative and legatary, and consequently to create a trust, where the property was certain, and the objects of the testator's bounty clearly pointed out.

§ 14. *Nicholas Harding* gave by his will to *Elizabeth* his wife all his estate, leases, and interest, in his house &c. "but did desire her at or before her death to give such leases, houses, &c. unto and amongst such of his own relations, as she should think most deserving and approve of," and made her his executrix. The wife survived, but died intestate. It was decreed, that, as the word "*relations*," was a legal description, this was a devise to such relations, and operated as a trust in the wife by way of power of naming and apportioning; and her non-performance of the power did not make the devise void, but the power devolved on the court.

Harding v. Glynn,
1 Atl. 469.

It was therefore decreed, that the property devised (being personal) should be divided according to the statute of limitations.

Nowlan v. Nelligan,
1 Bro. Rep.
489.

§ 15. *Edward Wortley* devised his collieries and coal mines to trustees, their heirs, executors, administrators, and assigns, upon trust to convey and dispose of the same in such manner as his daughter, whether sole or covert, should direct or appoint, by any writing or writings under her hand and seal, in the presence of three witnesses. And in a subsequent part of the will the testator declared, that although his meaning was to give his said daughter the absolute disposal

Bute v. Stuart,
1 Bro. Parl.
Ca. 476.

of the said collieries, to prevent the expences and trouble that must attend the management of affairs of such a nature under the direction of the Court of Chancery, he requested his said daughter to direct the money arising therefrom to be applied in such manner as he had directed the same, in default of her direction and appointment.

A question having arisen on the construction of this will, whether Lady *Bute* had an absolute power of disposing of the collieries, Lord *Henley* declared that the testator did not intend to empower Lady *Bute* to direct the trustees to dispose of the premises for her absolute benefit, or without consideration; but that he intended only to give her a power to have the same sold, and that the money arising therefrom should be applied to the purchase of lands, in the same manner as the clear profits of the premises in case she had made no appointment. And decreed accordingly, which was affirmed by the House of Lords.

Pierfon v.
Garnet,
2 Bro. Rep.
38. 226.

§ 16. *John Garnet*, Bishop of *Clogher*, devised the residue of his personal estate to *P. Pierfon*, his executors, administrators and assigns, adding these words,
“ And it is my dying request to the said *P. Pierfon*,
“ that if he shall die without leaving issue living at
“ his death, that the said *P. Pierfon* do dispose of
“ what fortune he shall receive under this my will,
“ to and among the descendants of my late aunt *Ann*
“ *Coppinger*, his grandmother, in such manner and
“ proportions as he shall think proper.”

It was decreed by the Master of the Rolls; and affirmed by Lord *Thurlow*, that these words were imperative, and created a trust in favour of the descendants of *Ann Coppinger*.

§ 17. The courts have in some instances allowed of a devise by implication, where it has been very apparent, in order to support and effectuate the intention of the testator; but in cases of this kind, the implication must be a necessary, and not merely a possible, or probable one; for the title of the heir at law being plain and obvious, no words in a will ought to be construed in such a manner as to defeat it, if they can have any other signification.

Devise by
Implication.

§ 18. The first case in which a devise by implication was allowed, arose in 13 *Hen.* 7. A man devised his goods to his wife, and that after the decease of his wife, his son and heir should have a certain house. It was determined that this was a good devise of the house to the wife, for life, by implication; for by the express words of the will, the heir was not to take it till after the death of the wife, and therefore if she did not take it, no one else could.

Bro. Ab.
Devise, pl. 52.
Cro. Ja. 75.

§ 19. *A.* having a wife and two daughters his heirs at law, devised lands to one of his daughters after the death of his wife. Decreed that, although the daughter was but one of the heirs at law, yet that the wife should take an estate for life by implication.

Hutton v.
Simpson,
2 Vern. 723.
Willis v.
Lucas,
1 P. Wms.
472.

Cro. Eliz. 15.

§ 20. It was also formerly held, that a devise to a stranger, after the death of the devisor's wife, would give the wife an estate for life, by implication. But this determination has been repeatedly contradicted; because in this case two implications arise, the one, that the testator meant the lands should go to his wife, the other, that they should descend to his heir; and, therefore the implication in favour of the wife being only a possible, and not a necessary one, the title of the heir must prevail.

Smartle v.
Scholar,
2 Lev. 207.
2 Jon. 98.

§ 21. A person devised to *A.* and his heirs, after the death of the devisor and his wife. It was determined that *A.* who was a stranger, should take nothing, until the death of the wife; and that, in the mean time, the lands should descend to the heir at law.

Fawlkener v.
Fawlkener,
1 Vern. 22.

§ 22. A copyholder devised underwoods to *J. S.* for twenty years, after the death of his wife, to raise portions for his younger children; and the question was, whether the wife took an estate for life, by implication, under this devise. Lord *Nottingham* said, that where such a devise is made to the heir, there indeed an estate shall arise to the wife by implication; but, where it is devised to a stranger, as in this case, there in the mean time it shall descend to the heir.

Gardner v.
Sheldon,
Vaugh. 259.
1 Ab. Eq. 197.

§ 23. A person having issue a son, who was his heir apparent, and two daughters, devised in these words.—“ If it happens my son *B.* and my two daughters to die without issue of their bodies law-
“ fully

“ fully begotten, then all my lands shall be and
 “ remain to my nephew *D.* and his heirs.” It was
 held, 1st, That no express estate was by this will
 given to his children. 2d, That they did not take
 any estate by implication, because then it must either
 be a joint estate for life, with several inheritances in
 tail, or several estates tail in succession, one after
 another. The last it could not be, because it would
 be uncertain who should take first, who next, &c.
 and the first it could not be, because the heir at law
 shall not be disinherited, without a necessary implica-
 tion, which in this case there was not, for it was only
 a designation and appointment of the time when the
 land should come to the nephew; and therefore the
 lands descended to the heir at law.

§ 24. With respect to the words which are necessary
 in a will to describe the devisees, any words which are
 sufficient to point out the persons meant by the
 testator, and to distinguish them from all others, will
 be sufficient.

What Words
 necessary to
 describe the
 Devisees.

§ 25. A devise was to *Margaret*, the daughter of
W. K. The daughter's name was *Margery*. The
 question was, whether *Margery* should take. Held,
 that she should, *quia constat de personâ*.

Gynes v.
 Kinnesley,
 Freem. 293.

§ 26. A person devised an estate to *William Pit-
 cairne*, eldest son of *Charles Pitcairne* of *Twickenham*.
Charles Pitcairne had an eldest son; but his name was
Andrew. It was decreed to be a good devise.

Pitcairne v.
 Brafé,
 Finch, 403.

Bate v.
Amherst,
T. Raym. 82.

§ 27. A person devised all his lands in *Kent* and *Suffex* to one of his cousin *Nicholas Amherst's* daughters, that should marry with a *Norton*, within fifteen years. *Nicholas Amherst* had three daughters, one of whom married with a *Norton* within the fifteen years. This was adjudged a good devise to her, notwithstanding the uncertainty; and that the law would supply the words, "*who shall first marry.*"

River's Case.
1 Atk. 410.

§ 28. A person devised an equal share of his estate to his two sons *James* and *Charles Rivers*. Lord *Hardwicke*.—First question: "Whether, as it appeared that "*James* and *Charles* were two illegitimate children, "this was such a description of their persons, as would "entitle them to take under the will?" In the case of a devise, any thing that amounts to a *designatio personæ* was sufficient; and, though in strictness they were not his sons, yet if they had acquired that name by reputation, in common parlance, they were to be considered as such. It has been said, the testator has made a mistake in their names, and therefore they cannot take, but the law is otherwise; for, if a man is mistaken in a devise, yet if a person is clearly made out, by averment, to be the person meant; and there can be no other, to whom it may be applied, the devise to him is good.

The Word
Heir is some-
times a good
Description.
Tit. 16. c. 1.
f. 30.
Ferne Cont.
Rem. 319.

§ 29. In consequence of the rule of law, that *nemo est hæres viventis*, an immediate devise to the heirs of a person who was living, would be void. But a limitation in a will to the heir special of a person living, has been adjudged good, where the limitation has

has been qualified by the words, now living, or some other circumstances have appeared in the will, to manifest the testator's intention that the estate should vest.

30. Thus where a person devised to a trustee and his heirs, in trust to permit *Robert Durdant* to receive the rents during his life, and after his decease to the heirs male of the body of the said *Robert Durdant*, then living. It was adjudged that this was a vested remainder in the only son of *Robert Durdant*; the words heirs male of the body then living, being a sufficient designation of such only son, and as much as if it had been to his heir apparent.

Burchett v. Durdant,
2 Vent. 311.

§ 31. A person devised the remainder of all his estate to the heirs male of his aunt *Elizabeth Long* lawfully begotten, and for default of such issue, the reversion to his own right heirs. And gave a legacy of 100 l. to the said *Elizabeth Long*. At the death of the testator *Elizabeth Long* was living, and the question was, whether her eldest son could take under this devise, and it was adjudged by the Court of Exchequer that he should take. Upon a writ of error in the Exchequer Chamber before the Chief Justices *Parker* and *Trevor* this judgement was reversed. But upon a writ of error in the House of Lords the judgement of the Court of Exchequer was affirmed, upon the principle that the word heir had several significations. In the strictest sense it signified one who succeeded to a dead ancestor, but it also signified in a more general sense an heir apparent, which supposed the ancestor to be living,

Darbishon v. Beaumont,
3 Bro. Parl. Ca. 60.
1 P. Wms. 229.

living, and in this latter sense the word heir was frequently used in statutes, law books, and records. As, therefore, the law gave several senses to this word, it would be hard, in the present case, to expound it in the most strict and rigorous sense, which would destroy great part of the will, when by law it might have another sense, which would support the whole will, and the manifest design of the party.

Goodright v.
White,
2 Black. R.
1010.

§ 32. A person devised to his son *Richard Brooking* his heirs male, and to the heirs of his daughter *Margaret White*, jointly and equally, to hold to the heirs male of *Richard* lawfully begotten, and to the heirs of *Margaret*, jointly and equally, and their heirs and assigns for ever. It was resolved, that this was a sufficient designation of the person to make the son of *Margaret* take as her heir, living the mother.

Doe v.
Ironmonger,
3 East. R.
533.

Issue is a good
Description.

§ 33. The word issue is a sufficient *designatio personæ*, or description of a devisee in a will; and, therefore, a devise to the issue of *A.* will be sufficient to pass the estate to all the children and grandchildren of *A.*

Cook v. Cook,
2 Vern. 545.

§ 34. A devise was made to the issue of *J. S.* who then had a daughter living, and afterwards had a son born. The question was, who should take; Lord *Cowper* said, that all the children should take, and even grandchildren, if there had been any; and, although the devise was to the issue begotten, that made no difference, the words begotten, and to be begotten, were the same, as well upon the construction of wills as settlements, and take in all the issue after begotten.

And,

And, although upon the death of the testator, there was then only a daughter born, yet, upon the birth of another child, the estate should open, and take in an after-born son.

§ 35. In the case of *Loddington v. Kime*, a devise to the issue male of *Evers Armyn* and his heirs for ever, was held to be a good description of the person, and a word of purchase.

Tit. 16. c. 1.
f. 45.
1 Ld. Raym.
205.

§ 36. The words sons, children, descendants, relations, next of kin, nearest of blood, are sufficient to describe the devisees in a will; provided they can be applied with certainty to persons answering such descriptions.

And also
Sons, Chil-
dren, &c.
Cro. Eliz.
532—576.

§ 37. A person devised her real estate to her daughter, with a proviso, that if she died before 21 or marriage, then to her nearest relations of the name of *Pyot*, and to his or her heirs for ever. The daughter died under 21, and unmarried. At the death of the testatrix, there were three persons of the name of *Pyot*, viz. a man and his two sisters, then unmarried, and another sister originally of the name, but married when the will was made. At the time of the contingency's happening, there was another person, who was heir at law to the testatrix, and of the name of *Pyot*, but more remote in degree than the others. Lord *Hardwicke* decreed that the man and his two sisters, and their married sister, being the nearest relations of the name of *Pyot*, should take under this devise.

Pyot v. Pyot,
1 Vef. 335.

Marth v.
Marth, 1 Bro.
R. 293.

Crosby v.
Clare, Amb.
R. 397.

§ 38. A testator devised his estate to three persons for life, and, after their death, to the descendants of *Francis Ince* then living, in and about *Sevenoaks* in *Kent*. Sir *T. Clarke* M. R. said, that a devise to descendants at large had been good ; here the devisor added a description of such as he intended should take, which was sufficiently precise and certain. It would be unjust to confine it to the heirs at law, because the words descendants mean all those who proceeded from his body, and, therefore, the grandchildren of *Francis Ince* were entitled ; but a great-grandchild, being born after the will made, was excluded by the words then living.

What Words
necessary to
describe the
Things de-
vised.

§ 39. With respect to the words that are necessary to describe the property intended to be devised, as a will is always construed in the most favourable manner for the benefit of the devisees, the same accuracy is not required in the description of those things which are intended to be devised, as is necessary in a deed ; it being sufficient if the words denote, with sufficient certainty, what is meant to be given.

Chamberlaine
v. Turner,
Cro.Car. 129.

§ 40. A person being seised in fee of a house called the *White Swan* in *Old Street*, devised it in these words :— “ I devise the house or tenement “ wherein *William Nichols* dwelleth, called the *White “ Swan*, in *Old Street*, to *Henry Gallant* my daughter’s son for ever.” And the jury found, that the said *William Nichols*, at the time when the will was made, and when the testator died, occupied the alley of the said house and three upper rooms, and that
divers

divers other persons at the same time held and occupied the garden and other places in the said house. The question was, whether all the house passed, or only the entry and the three rooms which were in the possession of *William Nichols*.

The Chief Justice (*Hyde*) doubted thereof, but *Jones*, *Whitlock*, and *Croke*, were of opinion, that all the house passed to the devisee, for the devise being “that house or tenement,” and the conclusion, “called the *White Swan*,” did both of them necessarily import the whole house. For the sign of the *White Swan* could not be intended to refer to the three rooms; and the words after, *viz.* “wherein *William Nichols* dwelleth,” did not abridge or alter that devise; and the house being named by the particular name of the *White Swan*, although *William Nichols* never inhabited therein, but only occupied three rooms, passed by the devise. If the house had not been described by the particular name of the *White Swan*, and the testator had devised the house in the occupation of *William Nichols*, there peradventure it should not extend to more than what was in the occupation of *William Nichols*.

§ 41. The courts have even gone so far as to determine, that where the words used by a testator are only applicable in their strict technical sense to a species of property which the testator has not, they shall be applied to some other species of property which the testator has, in order to effectuate his intention. For, in cases of this kind, it is clear the testator has been ignorant of the technical meaning of the words which
he

he has used, but as he must have had some intention when he used them, the courts, in order to give effect to that intention, will apply such words to the property, to which the testator appears to have intended to apply them.

*Inchly v.
Robinson,
3 Leon. 165.*

§ 42. A person being seised of a fee-farm rent issuing out of the manor of *F.* and of no land whatever, devised his manor of *F.* to *J. S.* It was held, that these words passed the fee farm rent; for the devisor, being seised of that rent, and of nothing else in the manor, it was plain he meant the rent, and could mean nothing else; so that, otherwise, the will must have been entirely void.

*Day v Trig,
1 P.Wm.286.*

§ 43. A person devised all his freehold houses in *Aldersgate Street* to the plaintiff and his heirs. The testator had no freehold houses there, but had leasehold houses. It was decreed by Mr. Justice *Tracy*, that though in a grant of all one's freehold houses, leasehold houses could not pass, and that, in the case of a will, had there been any freehold houses to satisfy the will, the leasehold houses should not have passed, yet the plain intention of the testator being to pass some houses, and he having no freehold houses there, the word freehold should rather be rejected than the will be wholly void, and the leasehold should pass.

§ 44. A mistake in the description of the place where the lands devised are situated, will not, for the same reason, be allowed to invalidate a devise.

§ 45. A testator devised all the profits of his houses and lands lying in the parish of *Billing*, and in a street there called *Brooks Street*, to his wife for life, when, in truth, there was no such parish as *Billing*, but the land supposed to be devised was in *Billing Street*. All the court held the will to be good.

Pacy v. Knolls, Brownl. 131.

§ 46. A person made his will in these words; I devise to J. S. all those my lands in *Bramstead* in the county of *Surry*, in the possession of *John Ashley*, whereas, in fact, the testator had not any lands in *Surry*, but he had lands at *Bramstead* in *Hampshire*, in the possession of *John Ashley*. In an ejectment brought for these lands in *Hampshire*, by the heir of the testator against the devisee, it was ruled by Lord *Holt*, that they passed by the devise.

Hastead v. Serie, 1 Ld. Raym. 728.

§ 47. The words, lands, tenements, and hereditaments, will pass every species of real property. And, in a modern case, it was determined, that money directed to be laid out in lands, would pass by the words lands, tenements, and hereditaments whatsoever, and wheresoever.

Lands, Tenements, and Hereditaments. Rashley v. Master, 3 Bro. R. 99.

§ 48. The words, all my lands, are sufficient to pass a house. If, however, it appears not to have been the intention of a testator to give a house by the words, all my lands, they will not have that effect.

Cro. Eliz. 477.

§ 49. A person being seised of a house in *Dale*, and of three houses and certain lands in *Sale*, devised his house in *Dale*, and all his lands in *Sale*, to *B.* It was resolved,

Ewer v. Hayden, Cro. Eliz. 476.

resolved, that the houses in *Sale* did not pass, on account of the express mention of the house in *Dale*; for *expressum facit cessare tacitum*; and, if the testator had intended to devise the houses in *Sale*, he would have mentioned them, as well as he did the house in *Dale*.

Woodden v.
Osborn, Cro.
Eliz. 674.

§ 50. One *Bishop* being seised of divers lands called *Hayes Lands*, which extended into two vills, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes Lands*, to his youngest son and his heirs: and, in another part of his will, he devised, that if his youngest son died without issue, his wife should have *Hayes Lands*. The question was, whether the wife should have *Hayes Lands* in *Cranfield*, or only in *Cokefield*? And it was resolved by the whole court, that she should have that only which was in *Cokefield*, because there was no more devised to the youngest son. But *Popham* said, if the devise had been to the eldest son, and that, if he died without issue, his wife should have *Hayes Lands*, there, peradventure, she should have all, because the eldest son had all, the one part by devise, the other part by descent, and she should have all which he had.

Estate.

§ 51. The word estate will pass every kind of property, unless restrained by other words.

Bridgewater
v. Boulton,
Salk. 236.

§ 52. The Earl of *Bridgewater* by his will, gave part of his personal estate to his son-in-law, and then added these words; and all other my estate real and personal. The question was, whether fee farm rents passed by this devise? Lord *Holt* delivered the opinion

of the court, that the rents passed by the words, all my real and personal estate, for the word estate was *genus generalissimum*, and included all things real and personal.

§ 53. A person devised all the rest and residue of his estate whatsoever and wheresoever to his wife. It was contended, that the word estate did not necessarily mean real estate; but Lord *Mansfield* answered, that the word estate carried every thing; unless tied down by particular expressions.

Roe v. Harvey, 5 Bur. R. 2638.

§ 54. A person devised all the rest and residue of her estate, of what nature or kind soever. It was contended, that these words only applied to the personal property of the testator, because it was accompanied with limitations peculiar to personal property; but the court said, they could not restrain the meaning of those words to personal property, and negative the operation of them, as to real estates.

Doe v. Chapman, 1 H. Black. R. 223.

§ 55. Where the word estate is confined to personals only, it will not be construed to extend to real property.

§ 56. Thus, where a man having settled all his estate of inheritance upon his wife for life, for her jointure, made his will, and thereby devised several pecuniary legacies, and then said, all the rest and residue of my estate, chattels real and personal, I give and devise to my wife. And the question was, whether, by this devise, the reversion of the jointure lands passed

Markant v. Twisden, 1 Ab Eq. 211.

to the wife? The Lord Keeper decreed it did not, because the precedent and subsequent words explained his intent to carry only his personal estate; for, in the first part of the will, having given only legacies, and no land, the words, all the rest and residue of his estate were relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for, having before given no real estate, there could be no rest or residue of that out of which he had given away none. Then the words chattel real and personal explained the word estate, and shewed what sort of estate he meant, and made the devise as if he had said, all the rest of my estate, whether chattels real or personal, &c. and so confined and restrained the extended sense of the word estate.

Timewell v.
Perkins,
2 Atk. 102.

§ 57. A testator devised as follows; “ All those my
“ freehold lands and hop grounds, with the messuages
“ or tenements, barns, &c. in the tenure of *L.* and
“ all other the rest, residue, and remainder of his
“ estate, consisting in money, plate, jewels, cases, judg-
“ ments, mortgages, &c. or in any other thing what-
“ soever or wheresoever, I give to *A.B.* and her
“ assigns for ever.” Justice *Fortescue*, at the Rolls,
held, that the residue of the testator’s real estate did
not pass by this devise; for, although the word estate,
when unrestrained, would include lands, as well as
personal estate, yet here it was expressly confined to
personals, as plate, &c.; and, had the testator intended
to give all his real estate, why did he mention a part
of it only.

§ 58. The words, all my rents, are sufficient to pass All my Rents.
real estates, for it is according to the common phrase,
and usual manner of speaking of some men, who name
their lands by their rents.

§ 59. A special verdict was found, that a man let Kerry v.
several houses and lands, by leases for years, rendering Derrick, Cro.
several rents, and afterwards made his will in these Ja. 104.
words; as concerning the disposition of all my lands
and tenements, I bequeath the rents of *D.* to my wife
for life, remainder over in tail. The question was,
whether, by this devise, the reversions passed with the
rents of the lands? for it was contended, that the rent
divided from the reversion was not devisable within
the statute, the devisor having no reversion therein.
But the court resolved, that the land itself passed by the
devise; for it appeared to be the intention of the testator
to make a devise of all his lands and tenements, and
that he intended to pass such an estate as should have
continuance for a longer time than the leases should
enure; and the words were apt enough to convey it,
according to the common phrase, and usual manner of
some men, who name their land by their rents.

§ 60. A devise of a messuage will carry with it the Messuage and
curtilage and garden annexed to it, even without House.
the word appurtenances, for they are part of the Carden v.
messuage. Tuck, Cro.
Eliz. 89.

§ 61. It was formerly held, that the word house did 2 Ch. Ca. 27.
not, in a will, carry the garden or curtilage, belonging

to such house, without the word appurtenances; but this doctrine is now somewhat altered.

Doe v. Collins, 2 Term R. 498.

§ 62. *A.* being tenant for years of a house, garden, stables, and coal-pen, occupied by him, devised in the following words; “ I give the house I live in, and “ garden, to *B.*” It was determined, that the stables and coal-pen passed, they not being specifically given in the subsequent part of the will, though the testator used them for the purpose of trade, as well as for the convenience of his house.

Buck v. Nurton, 1 Bos. & Pul. 53.

§ 63. In a subsequent case, it was determined by the Court of Common Pleas, that lands usually occupied with a house did not pass under a devise of a messuage, with the appurtenances, it not appearing that the testator meant to extend the word appurtenances beyond its technical sense.

All I am worth.

§ 64. The words, “ all I am worth,” without any other words to control them, will pass real as well as personal estate.

Huxlop v. Brooman, 1 Bro. R. 437.

§ 65. A testator having given all the overplus of his money to the son and daughter of *J. S.* proceeded in these words; “ I give and bequeath to them all I am “ worth, except 20 *l.*, which I give to my executor.” It was contended, that there being no expression in the will which pointed at the real estate, the personalty could only pass. But it was decreed, that these words carried both the real and personal estate.

§ 66. The word legacy may be applied to a real estate, if the context of the will shew that such was the testator's intention.

Legacy.
Hardacre v.
Nash, 5 Term
Rep. 716.
1 Bur. 268.

§ 67. The words, all the remainder and residue of all my effects, both real and personal, which I shall die possessed of, were held to pass freehold estates, as well as chattels real.

Remainder
and Residue
of all my
Effects.

§ 68. *George Jackson* being seised of several real estates, descendible freeholds, and chattels real, gave to his mother *Mary Jackson* some particular estates for life, without liberty of committing waste; he afterwards gave several legacies, and an annuity of 30 l. to his heir at law, and then proceeded thus; "I also
" give and bequeath unto my dearly beloved mother,
" *Mary Jackson*, all the remainder and residue of all
" the effects, both real and personal, which I shall die
" possessed of."

Jackson v.
Hogan, 3 Bro.
Parl. Ca. 388.

The question was, whether this last clause passed all the testator's estates to his mother in fee-simple?

The Court of King's Bench in *Ireland* gave judgment in favour of the heir at law; but this judgment having been reversed by the Court of King's Bench in *England*, in *Trinity* term 1775, a writ of error was brought in the House of Lords.

It was contended on behalf of the appellant,

1st, That it was an established rule, that an heir at law should not be disinherited, but by express words, or necessary implication: the residuary clause, in this case, contained no express devise of the real estates; the word "*effects*" being properly applicable only to personal estate. The subsequent words, "*which I shall die possessed of,*" supported and strengthened this construction; because the express allusion of those words to a future acquisition was inapplicable to real estates, as none, acquired after the publication of the will, could pass by it; and the word "*possessed*" properly relates, only to personal estate. And as to the word "*real,*" annexed to the word "*effects,*" it applied expressly to the chattels real left by the testator; nor was there any necessary implication, that any greater interest in the real estates was intended for the mother, than the estate for life, without power of waste, expressly devised to her, in two of the denominations. Such an implication, so far from being necessary, was incompatible with, and would merge and destroy, and, in fact, revoke, the mother's express estate for life, and restriction from waste; and would break through another rule, as well of law, as of common sense, which says, that what is expressed, shall not be destroyed by implication.

2d, Another rule of construction was, that where words, used by a testator, are indifferently applied to real and personal estates, they shall not, if there be any thing to satisfy them, receive a construction prejudicial to the heir. Now, in the present case, the words "*bequeath,*" "*effects,*" and "*possessed of,*" were
indisputably

indisputably much less applicable to real, than to personal estate; they have never been admitted to apply to the former, but where insurmountable arguments of such an intent, afforded by other parts of the will, rendered that construction necessary; but here, the other parts of the will were so far from requiring such a construction, that they were destroyed, if it were admitted. The words, in their most proper sense, apply to personal estate; and the chattels real, which the testator left, shewed his reason for annexing the word "*real*" to "*effects*;" which, otherwise, properly means moveables only, and fully satisfied those words: they could not, therefore, be extended to real estates.

3d, It was also an established rule, that general words in one part of a will shall be so construed, as not to defeat the plain intention of the testator, to be collected from any other part of his will. Now, in the present case, the devise to the mother for life, without power of waste, was incompatible with an intention to give her the same lands in fee; and, therefore, the residuary clause must be so construed, as to avoid this inconsistency.

On the other side, it was contended, that it was manifest the testator did not mean to die intestate, as to any part of his real property, not only from the expressive words in the residuary clause, but also, from the introductory words of the will, "*as to my worldly substance*," which have been always understood to consist of real and personal estate, and to indicate an intent in

the testator, who uses them, to dispose of all his property. The testator's first devise to his mother was only of a part of his real estate: creditors were entitled to another part, that is, so much as should be sufficient, by sale, to discharge their incumbrances. The legatees were entitled to a further part thereof, yet there still remained some part to dispose of; and this remainder the testator had, with perfect consistency, given to his mother, by the residuary clause: the views, with which he made these two devises, were sufficiently obvious; by the former, in all events, and subject to no incumbrance, he made a provision for his mother; by the latter, he gave her the residue, which might remain after all the incumbrances should be discharged. He had not, therefore, given *part* and the *whole* to his mother. In this case, the heir at law was disinherited, both by express words and by necessary implication: for, in the residuary clause, the testator had made use of the most expressive and comprehensive words, in giving to his mother the whole remainder of his real property.

The Judges having been consulted on this case, the Lord Chief Baron delivered their unanimous opinion, that *Mary Jackson* took an estate in fee, in all the testator's property, under the residuary clause; and the judgement of the Court of King's Bench in *England* was affirmed.

Doe v. Chapman, 1 H. black. 223.

§ 69. A person devised all the rest and residue of her estate of what nature or kind soever. It was contended that these words only extended to personal estate,

estate, as the heir at law was not to be deprived of his inheritance, except by express words or necessary implication. But the court said, they could not restrain the meaning of these words to personal property, and negative the operation of them as to real estates, particularly as they were so general and comprehensive.

§ 70. In a subsequent case the Court of King's Bench held that the words, residue and remainder of effects did not extend to real estates from the apparent intention manifested by the testator, of not extending the word effects to real estates.

Camfield v. Gilbert,
3 East R. 516.

§ 71. General words in one part of a will may be restrained by subsequent ones; but such subsequent words must be expressly used to restrain the preceding general ones; thus where lands were mentioned in a devise to be in the tenure of *A.*, these words were considered as an additional description, and not as a restriction.

Where general Words are not restrained.

§ 72. Doctor *Paul* devised to his wife, his farm at *Bovington*, in the tenure and occupation of *John Smith*. He devised to her several other estates in the same manner, and concluded by a general devise to her of all his freehold and copyhold lands above devised. The farm at *Bovington* was a copyhold, which was demised to *John Smith*, with an exception of the woods and underwoods. The heir at law brought an ejectment for the woods, and the question was whether they passed by the will, not being in the tenure

Paul v. Paul,
2 Bur. 1089.
1 Black. R.
255.

and occupation of *John Smith*, or descended to the heir at law.

Lord *Mansfield* held, that the words, in the tenure and occupation of *J. S.*, were not words of restriction, but of additional description; had the testator meant them as restrictive, he would have said, all that part of my farm, or so much of my farm as is in the tenure, &c. The farm was an entire thing.

Judgement for the devisee.

Doe v.
Meakin,
1 East R 456.

§ 73. A person devised as follows—"I give and
"devise all that my messuage, dwelling house or tene-
"ment, with the shop, barn, stable, and other build-
"ings thereto belonging, *which said messuage or*
"tenement, building, lands, and premises, are now in
"my own possession, and all other my real estate what-
"soever, in *Murrey* or elsewhere in the parish of *Yoxall*
"(in the county of *Stafford*) or in any other place
"whatsoever in *Great Britain*, to my wife *S. B.* and
"her assigns, for and during the term of her natural
"life: and from and after her decease I give and de-
"vise the said messuage or tenement, buildings, lands
"and premises, unto my youngest son *William Bid-*
"dolph, his heirs and assigns for ever," &c. He
then gave to his eldest son *John*, the father of the
lessor of the plaintiff, one shilling, and the same sum
to others of his family; and then desired his wife to
let his son *William* have the use and enjoyment of his
workshop and tools belonging to his trade of a black-
smith, during her life, without the payment of any
rent

rent or other consideration for the same. It appeared that the premises in question, which were a certain dwelling house with the appurtenances, were never in the *possession* of the testator, he having only the reversion in fee, expectant upon the death of the widow of his brother, old *William Biddulph*, who survived him and died lately. A verdict was taken for the lessor of the plaintiff, with liberty to the defendant to move to set it aside and enter a verdict for himself; if the court should be of opinion that, under the words of the will, the reversion in fee in the premises in question passed to *William Biddulph* the son. And, a rule *nisi* having been obtained for this purpose, Lord *Kenyon*, C. J. said :

“ This is a very plain case. The testator after giving to his wife for life certain messuages and premises, which he describes as being in his own possession, with many unnecessary words, proceeds further to give her for the same term “all other his real estate whatsoever in *Murrey* or elsewhere, &c. or in any other place whatsoever in Great Britain,” And after her decease he gives “ the said messuage or tenement, buildings, lands, and premises,” to his youngest son *W. B.* in fee. It cannot be pretended that, if the reversion in these premises had fallen into possession in the lifetime of the testator’s widow, she would not have been entitled to enjoy them for her life; then how could we controul the generality of the words of the devise over to the son, which certainly are large enough to carry the reversion of all that the widow was entitled to for life. In *Termes de la* P. 241.

Ley

“ *Ley*, which is a very excellent book, it is said in
 “ laying down rules for unlettered men to make their
 “ wills, that if one devise to J. S. all his *lands and*
 “ *tenements*, not only all his lands in possession pass,
 “ but all those also which he has in reversion by virtue
 “ of the word *tenements*. Here too the word *premises*,
 “ with reference to what was before devised to the
 “ widow, would be sufficient to convey all. But it is
 “ said that it must be confined to premises in the
 “ testator’s possession, because it is connected with
 “ such restraining words in the first clause; but that
 “ would be to reject all the intermediate words, to
 “ which the *said premises* have a reference, and
 “ amongst them the devise of “all other his real
 “ estates whatsoever,” &c. Though there be a parti-
 “ cular description of property in a devise, yet if other
 “ general words are added, large enough to carry
 “ other property, they cannot be rejected, and the
 “ devise confined to the property particularly de-
 “ scribed; as was settled long ago in *Chester v. Chester*,
 “ and was holden more recently in *Freeman v. the*
 “ *Duke of Chandos*, when a remote reversion not in
 “ contemplation of the parties passed by general words
 “ after a particular description.”

Infra.

Lawrence, J.—“ The word *premises* in the *first*
 “ clause meant the several things before mentioned;
 “ and, according to the same sense in the last clause,
 “ it comprehends all that was then before de-
 “ scribed.”

§ 74. Where a testator uses general words, equally applicable to freehold and leasehold property, they have in general been restrained to freeholds, where the testator has both freehold and leasehold property; unless a contrary intention appears, and are only applied to leasehold property, where the testator has no freehold property to satisfy them.

General Words confined to Freeholds.

Antef. 4

§ 75. It was resolved by the Court of King's Bench in 8 *Cha.* 1. "That if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the lease for years. And if a man hath a lease for years, and no fee simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void."

Rose v. Bartlet, Cro. Car. 292.

§ 76. Lady *Boreman* being seised in fee of lands in *Kent*, and possessed of a mortgage for years in *Effex*, and also of an extended interest upon a statute in *Bucks*, devised all her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, in *Kent*, *Effex*, *Bucks*, *Bedfordshire*, or elsewhere in the kingdom of *England*, of which she was any ways seised or entitled to, unto her nephew. By a latter clause the testatrix gave all the rest, residue, and remainder of her personal estate, plate, gold, &c. and all her mortgages, bonds, specialties, and credits, whatsoever they should consist of, to her nephew and niece. The question was, whether the chattel interests of the testatrix passed by the first clause in the will. Lord King

Davis v. Gibbs, 3 P. Wms. 26.

King decreed that they did not, and this decree was affirmed by the House of Lords.

§ 77. The doctrine established in the two preceding cases, has been in some degree contradicted by the two following cases, in which general words have been applied both to freehold and leasehold property:

Addis v.
Clement,
2P.Wm. 456.

§ 78. *Thomas Addis* being seised in fee of some lands, and possessed of a lease for twenty-one years, all in the possession of *A. B.* and it being by reason of long unity of possession very difficult to distinguish the fee simple from the leasehold premises, devised all his messuages, lands and tenements, in the parish of *D.* which he then stood seised or possessed of, or any ways interested in, and which were in the possession of *A.* and *B.* unto his wife *Jane* for her life, remainder to his brother and the heirs of his body, remainder over.

Lord *King* said, the question was, whether the leasehold passed with the freehold; he must own the limitations were improper, but then the words were very strong—all the lands which the testator was seised or possessed of, or any ways interested in; which words, possessed of or interested in, properly referred to a leasehold estate; and distinguished the present case from that of *Rose v. Bartlet*, where the words, possessed of or any ways interested in, were not to be found; and as the lease for twenty-one years was held of the church and always renewable, the lessee, who was the testator, might look upon himself, from the right he had to renew, as having a perpetual estate

therein, a kind of inheritance, and therefore the leasehold premises ought to pass by the will. Decreed that the leasehold passed with the freehold.

§ 79. Sir *James Lowther* having both estates of inheritance and leaseholds in the county of *Cumberland* devised in these words—"I give all my manors, lands, tenements, mines of coal and lead, rents and hereditaments whatsoever in *Cumberland*, to *James Lowther* in tail. And whereas I am owner of several burgage tenures in *Cockermouth*, it is my will they shall not be intailed, as I have done my other estates in *Cumberland*, and therefore I devise them to Sir *William Lowther* and his heirs." A question arose in this case, whether the leasehold estates passed by the devise to *James Lowther*, or to Sir *William* the residuary legatee.

Lowther v. Cavendish,
Amb. 356.

Lord Keeper *Henley* said, it was plain from the clause excepting the burgage tenures, that the testator thought he had intailed these leaseholds upon Sir *James*. The word estates in the will was a general term, and comprehended both freehold and leasehold, and was not restrained to either. But it was said that he having both sorts of estates, by the general words, estates of inheritance only passed according to the case of *Rose v. Bartlett*. A single authority, where it was held that the words, lands and tenements related to estates of inheritance only. That resolution might be law in that particular case, though he could see no reason why those words should not include leaseholds too as they had been held to do, where other words were

Ante s. 75.

were added as in *Addis v. Clement*—lands in which he was in any way interested.—In the present case there were words inserted which were material to pass leaseholds, as, mines and rents, which it would be strange to suppose him to devise without the lands of which they were the profits, and from whence they flowed. He could never intend to give them in the residuary clause, after he had before specifically devised every estate he had.

Turner v.
Husler,
1 Bro. R. 78.

Ante f. 75.

§ 80. A testator being seised of tithes in fee, and having a lease of other tithes for years perpetually renewable, without fine, devised all his lands, tenements, tithes, &c. to the defendant. The plaintiff being the personal representative of the testator, filed his bill for the leasehold tithes, insisting that the freehold tithes only passed by the will. Mr. Baron *Eyre* sitting for the Chancellor, said, the case of *Rose v. Bartlet* had been often referred to, and acknowledged, one could not but respect a case so supported, yet one could not help asking, why, by so general an expression, all the lands should not pass? No reason was given in the cases, there was none arising from the favour shewn to an heir at law, for the ordinary or next of kin were not considered in that light. There was none from the general rules of construction. If the words were the same, and the testator had only one interest, that would pass. If he had different interests, the intent seemed to be the same, why should not the whole pass? There was but little reason in saying that the freehold satisfied the words. By the case of *Paul v. Paul*, general words were not to be restrained, unless the

Ante f. 72.

the court sees abundant reason to think that the testator meant to use them in a restrained sense. There was no good reason, where there is freehold and leasehold, why the freehold only should pass; he could not see why both should not pass. The words were large enough; the determination of *Rose v. Bartlet* was very early, he was led to think the old idea of the dignity of the freehold, and small value of the *interesse termini*, led to it. The leaseholder was held to be a mere pernor of the profits. From the change of circumstances the rule was now become unsatisfactory. We are considering the intent of a testator; it is a degree of strictness inconsistent with the present state of things, to say that a man by his lands does not mean all. He did not mean to deny the authority of *Rose v. Bartlet*, but he could not build upon it, and take the construction for tithes here, that is applied there for lands. He was not prepared to say that the word tithes would not pass the leasehold, as well as the freehold. The form here was a lease, but being renewable it was as much the testator's as his inheritance. The case of *Addis v. Clement* was argued from the intent. The limitations here were fit for an estate of inheritance. He inferred from this that the power of renewal had made the testator forget that he had not the inheritance. As to there being no mention of a renewal, this was not upon a fine, so there was no need to raise a fund for that purpose. In common understanding chattels real are real estates. The case of *Addis v. Clement* was very near this case. He admitted the words "possessed of and interested in" made that case stronger, but the leading principles were the

same. He was glad to be supported by such a case in the opinion he should give, namely, that the leasehold tithes did pass.

§ 81. There is however a case determined by Lord *Hardwicke*, as well as two modern ones, in which the rule laid down in *Rose v. Bartlet* was adhered to, and general words restrained to freehold estates in exclusion of leaseholds.

Knotsford v.
Gardiner,
2 Atk. 450.

§ 82. A person being seised in fee of some lands and possessed of several leaseholds in the same parish, devised in the following manner—"I give, devise, and bequeath, unto *Martha* my wife for life, all my estates in *L.* and after her decease I give, devise, and bequeath the aforementioned estates to my daughter *Ann* and her heirs for ever. *Item*, I give and bequeath unto my wife all my goods and chattels, and all other things not before bequeathed." *Martha* the devisee, some time after the death of the testator, married again, and had the plaintiff by her second husband; who insisted that, by the devise to the wife of the residue, the leasehold lands passed to her, and claimed as executor of his mother, who was the executrix of the testator; saying that, as there were both freehold and leasehold, nothing but the freehold passed to the defendant, being sufficient to answer the word estates in the will.

Mr. *Murray* for the plaintiff, cited the case of *Rose v. Bartlet*, to shew that, if words are used applicable
to

to both, they will by way of eminence only pass fee simple lands.

For the defendant it was said, that the wife of the testator had these very freehold lands settled upon her in marriage, and the testator had no other freehold, but a little cottage of very small value.

Lord *Hardwicke* observed, that as the facts were not fully before him, it must go to a trial at law. His Lordship stated the doctrine laid down in *Rose v. Bartlet*, and said, “Though in the present case I have
“ no doubt at all, as to the intention of the testator,
“ yet the rule of law would prevail.”

Chapman v. Hart,
1 Ves. 271.

§ 83. A testator being seised of freehold estates of considerable annual value, and also possessed of two farms holden by leases of 1000 years each, by his will gave, bequeathed, and devised, “All his manors, advowson, donation, right of patronage and presentation, and all and every his several messuages, lands, tenements, and hereditaments whatsoever, and wheresoever, which he was seised of, interested in, or entitled to, lying and being within the several counties of *N. E. W.* and *Y.* to his son, for life, with impeachment for all wilful waste, and from and after his decease to the heirs of his body;” with a similar limitation to his daughter, and the heirs of her body; remainder to the heirs of the testator’s family. This case was twice argued in *K. B.*: and the court upon very full consideration, and with some reluctance, determined, that the two leasehold farms

Pistol v. Riccardson,
1 H. Black.
R. 26
2 P. Wms.
459 n.

did not pass by this devise. Lord *Mansfield*, in delivering the judgment of the court, stated the will at length; and said, he did so in order to shew that there were no words in the will, except the devise itself, which indicated any intention in the testator to convey the leasehold premises; and that, although the words of the devise were very comprehensive, yet a *system of legal construction had been established in former cases* (especially *Rose v. Bartlet*, and *Davis v. Gibbs*) which precluded them from considering the intention of the testator *on the words of the devise*, as they might otherwise have done, and bound them in the decision of the principal case.

N. B. It seems that *Addis v. Clement* was not once adverted to in the consideration of this case.

§ 84. The rule laid down in *Rose v. Bartlet* has however been in some degree departed from by the Court of King's Bench in the following case.

Lane v. Lord
Stanhope,
6 Term Rep.
345.

§ 85. *Henry Bosville* being seised of several freehold estates, and possessed of a part of a farm held under the church for twenty-one years renewable, held with another part of the farm, and let together as one, devised all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estate whatsoever, to *R. Bettinson* for life; remainder to his first and other sons, &c. and gave all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate to *Richard Bettinson* for ever.

Upon

Upon a question in a suit in Chancery, whether the word "*farms*," carried the leasehold under the first devise, a case was sent to the Court of King's Bench for their opinion.

Lord *Kenyon*, C. J.—“ We will certify in this case ; but I will now say a few words to shew the foundation of my opinion. It is our duty, in construing a will, to give effect to the devisor's intention as far as we can, consistently with the rules of law ; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning ; that would be, as Lord *King* and other judges have said, removing land-marks ; but, if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear, and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases, which tend only to involve the question in obscurity. On the whole of this will, taking it together, I have no doubt. The devisor had two kinds of property, real and personal property. It appears by the case, that a part of a farm, held by a lease under the Archbishop of *Canterbury*, had been for a long course of years in the testator's family, and was considered almost equivalent to a perpetuity, on account of the covenant to renew ; and that, as far as can be traced, it had been let by the testator and his family, together with the rest of the farm, which is an estate of inheritance, and which belonged to them, as one farm, to

the same tenant, under one integral rent. Every one must be aware of the inconvenience of splitting this farm now, on account of the apportionment of rent, and the power of distress; and perhaps it would be difficult for either party to occupy it beneficially. The testator, having this various property, sat down to make his will; and he devised "all his manors, messuages or tenements, houses, *farms*, lands, wood-lands, hereditaments, and real estate, whatsoever and wheresoever, unto *R. Bettinson*," &c. In many cases that might be put, I should not lay much stress on the word "*farm*;" whether it should have much or little weight, must depend upon the subject. Then, after giving some pecuniary legacies, the testator added a residuary clause, by which he gave "all the rest and residue of his ready money, rents in arrear, stock in any of the public funds, jewels, and personal estate, unto *R. Bettinson*," &c. Now, if this will were to be read by any person, not fettered with legal and technical notions, he would not hesitate about the intention, but would say, that all the landed property, without considering the circumstances of that landed property, was disposed of by the first clause, and all the personal property by the last. It is material to observe, that the first words in the residuary clause apply to money; after which it is not to be supposed, that the testator intended to recur to the land; he having in the former part of his will used words sufficiently comprehensive to include every species of landed property. I admit that several of the limitations, which are applied to the real estate, are inapplicable to the species of property now in dis-

pate; but I think it would be too much to say, that that observation alone should preclude the idea, that the testator intended to pass the leasehold part of the farm, under the words used in the first clause; as we all know how frequently many of the limitations, used in a will, are inapplicable to every species of property disposed of by it. I do not wonder; that this court determined the case of *Pistol v. Riccardson* with reluctance, as is mentioned by the note in 2 *P. Wms.* for it appears, that that case came before the court at several different times. I only lament, that the case of *Addis v. Clement* was not then cited; for Lord *Mansfield* seemed to feel himself pressed by a torrent of authorities to decide contrary to his better judgment; and I cannot forbear thinking, that, if *Addis v. Clement* had then been mentioned, the court would have decided the other way with less reluctance. The reason, why they determined in that case that the leasehold farm did not pass by that will, was, because they thought that all the words there used had received in other cases a certain technical construction, and therefore that they were bound by those decisions. But we have not that difficulty to encounter in this case; because here we find another word in the will, "*farms*," which in its general signification means that, which is held by a person who stands in the relation of tenant to a landlord. The extrinsic circumstances also weigh strongly in this case. Therefore, taking into consideration the residuary clause, in which the items enumerated are all personal chattels, and that the testator did not mean to die intestate as to any part of his property, though the property in dispute is a personal estate, yet, as it is

connected with land, I think that the construction that this family have put on the whole will is the true construction."

The following certificate was afterwards sent to the Court of Chancery.

" We have heard this case argued, and considered
 " the effect of this will, and are of opinion, taking
 " the whole of the will together, that the leasehold
 " properly in question is not included in the residuary
 " bequest, but passed by the prior devise, although
 " some of the limitations, applied to the real estates,
 " are inapplicable to this species of property."

§ 86. In a subsequent case Lord Ch. Just. *Eldon* and all the other Judges of the Court of Common Pleas held, that the rule laid down in *Rose v. Bartlet* was a rule of property not to be shaken, and therefore that under a general devise, leaseholds did not pass, unless there was something to shew an evident intent that they should pass.

Thompson v.
Lawley,
 2 Bof. & Pul.
 R. 303.
 5 Ves. Jun.
 476.

§ 87. Mr. *Thompson* being seised of the manor of *W.* and other real estates in *Yorkshire*, and possessed of two leasehold houses, devised his manor of *W.* and all other his manors, messuages, lands, tenements, and hereditaments, to trustees and their heirs, to the use of his son for life, remainder in strict settlement; and devised all his money securities for money, goods, chattels and effects, and all other his personal estate not before disposed of, to his brother and sister. Upon a
 case

case sent by the Court of Chancery to the Court of Common Pleas, the question was, whether the leaseholds passed under the first general devise. Lord *Eldon* stated the reasons for the certificate, and after observing that Lord *Kenyon* had said in the preceding case, it was the duty of courts of justice to give effect to the devisor's intention, as far as they could consistently with the rules of law, not conjecturing but expounding his will from the words used; and that he was particularly impressed with the latter expression—"not conjecturing but expounding his will from the words used." His Lordship said, that whether the rule laid down in *Rose v. Bartlet* were wisely adopted or not, it was unnecessary to determine; but that case having once established a general rule, he had rather consent pointedly and avowedly to contradict that rule in terms, than to acknowledge it in words, and deny it in effect, by raising distinctions which in fact made it impossible for any man to decide in any particular case what was the legal construction of a will, as to this point, till he had obtained the authority of a court of law, in a judgement upon the will, for the opinion which he gave. That it did not appear that there was any equitable right of renewal, nor even the premises in question blended, in enjoyment or otherwise, with any freehold land; there was no difficulty in distinguishing them from each other, they had never been demised together, at one rent, reserved to heirs, they were short terms. No one of those particular circumstances which were relied upon in former cases existed in this. It was the simple case of terms for years, and a case of property, *prima facie*, that sort
of

of property which a disposition of personal estate must be intended to pass. That the estates included in the general devise were limited to the issue of the devisor in tail, with several remainders over. His Lordship entered into an examination of all the preceding cases, and concluded by saying—"The rule in *Rose v. Bartlet* is a rule which has been acknowledged for ages, and upon which I shall act, until I am informed by the highest authority, that I am no longer to regard it; till I shall be so informed I shall substantially regard it in judgement, for I think it better to over-rule it altogether, which I must not do, than to deny to it its effect, upon grounds which do not completely satisfy my mind, as solid and safe grounds of distinction."

All the other Judges said that the rule in *Rose v. Bartlet* ought not to be shaken, and the court certified that the leasehold houses did not pass by the general devise.

What Words
necessary to
pass Copy-
holds.
Tendril v.
Smith, 2 Atk.
85.
Godwyn v.
Godwyn,
1 Vef. 226.

§ 88. With respect to the words which are necessary to pass copyholds, it is laid down by Lord *Hardwicke*, that where copyhold lands are surrendered to the use of a will, they pass by a general devise of all the testator's lands and tenements, notwithstanding there are freeholds to answer such devise.

§ 89. But where copyholds have not been surrendered to the use of the testator's will, they do not pass by general words, because the want of a surrender renders

renders it doubtful whether the testator intended to dispose of his copyholds or not.

Vide Ante
ch. 4. f. 26.

§ 90. A person, being seised of real estates in *Huntingdonshire* and *Cambridgeshire*, and possessed of copyholds in those counties, devised all his messuages, farms, lands, tenements, and hereditaments, with the appurtenances in *Huntingdonshire* and *Cambridgeshire*, to his wife for life, &c. The copyholds were not surrendered to the use of the will; and, therefore, Lord *Kenyon*, (Master of the Rolls), held they did not pass by it.

Milbourn v.
Milbourn,
2 Bro. R. 64.

§ 91. A person devised to trustees all his messuages, cottages, lands, tenements, hereditaments, and real estate whatsoever, situate within the parishes of *N. &c.* and also all his messuages, &c. in *S. and Pershall, &c.* upon trust to sell and dispose of the same to pay his debts and legacies. The question was, whether a small copyhold estate, which was supposed to be freehold, passed?

Lindopp v.
Everall,
3 Bro. Rep.
188.

Lord *Thurlow* held, that it did not pass; for although where the copyhold is necessary to pay debts, it is held equivalent to a description of it, yet here, it not being necessary for that purpose, it should not pass for the further purpose of going to the younger child. The court had only held, that where a child was unprovided for, not where the question was, as to the more or less of the provision, to which the intention could never be held to apply.

Brooke v.
Gurney, cited
5 Vef. Jun.
559.

§ 92. A testator having freehold and copyhold estates, but not having surrendered the copyholds to the use of his will, gave all his estates by general words to his wife for life, and, in default of issue of his own body by her, to her in fee.

Sir *Thomas Sewell* M. R. thought the widow entitled to the copyhold estate under the words ; but the bill not being filed till 21 years after the will, and the widow having joined with her son in a conveyance in 1763, which amounted to an admission that she was not entitled to the copyholds, the Master of the Rolls thought the length of acquiescence, and that circumstance, put an end to her right.

Lord *Thurlow* affirmed the decree against the widow, but upon a different ground ; being of opinion, that as there was freehold estate to satisfy the words, the copyhold estate would not pass.

What Words
necessary to
pass Rever-
sions.

§ 93. With respect to the words necessary to pass estates in reversion, wherever a testator shews an intention to dispose of all his property by his will, and uses words sufficient for that purpose, the estates to which he is entitled in reversion will pass.

Wheeler v.
Waldron,
Allen. 28.
3 P.Wms.63.
n. E.

§ 94. A person, having a manor and other lands in *Somersetshire*, devised the manor to *A.* for six years, and part of the other lands to *B.* in fee ; and then comes this clause : “ And the rest of my lands in *Somersetshire*, or elsewhere, I give to my brother.” It

was adjudged, that the reversion of the manor passed by the word “*rest.*”

§ 95. A person settled part of his lands on his daughter for life, and devised another part to his wife for a year after his death, and then devised all his lands, not settled or devised, to *Thomas Keyse* and his heirs. Adjudged, that the reversion of the lands, settled on his daughter, passed by this devise.

Cooke v.
Gerrard,
1 Lev. 212.
Saund. 180.

§ 96. A person, being seised in fee, devised *Blackacre* to *A.* for life, and devised to *B.* all his lands not before devised, to be sold, and the money to be divided between his younger children. The question was, whether the reversion of *Blackacre* passed by the devise of all his lands not before devised? And, it being referred to the Judges of the Common Pleas, they unanimously agreed and certified, that the reversion was well devised. And it was decreed accordingly.

Rook v.
Rook, 2 Vern.
461.

§ 97. A person devised a house to *A.* and his wife for their lives, and then, the better to enable his wife to pay his legacies, he devised to her all his messuages, lands, tenements, and hereditaments whatsoever, within the kingdom of *England*, not before disposed of, to hold to her and her heirs. It was also found, that the testator left sufficient to pay his legacies, without the reversion of the house. The Court of King's Bench determined, that the reversion of the house did not pass; but this judgment was unanimously reversed in the Exchequer Chamber.

Willows v.
Lidcot,
2 Vent. 285.
3 Mod. 229.

Dalby v.
Champernon,
Skin. 631.

§ 98. A person who was tenant for life, remainder to his first and other sons, with the reversion in fee in himself, having a son and a daughter, devised all his lands, tenements, and hereditaments, to his daughter in fee, in case his son should die without issue. The son did die without issue: and *Holt* Chief Justice said, that though *B.* had only a dry reversion in fee, yet, that by the words “all his lands, tenements, and hereditaments,” such reversion would pass.

§ 99. The words “all my lands out of settlement,” and also the words “not by me formerly settled,” will comprehend reversions in fee, after estates tail.

Falkland v.
Lytton,
3 Bro. Parl.
Ca. 24.
Vide 3 Atk.
492.

§ 100. Sir *William Lytton*, being tenant in tail, after possibility, of some lands, remainder in fee to trustees, in trust for himself and his heirs; and being also tenant in tail of some other lands, remainder to the right heirs of his father, and having no issue, devised all his messuages, lands, tenements, and hereditaments whatsoever, *out of settlement*, to his nephew *Lytton Strode* and his heirs. The question was, whether the different reversions in fee, to which he was entitled, should pass by this will? It was decreed, that by the words “*lands out of settlement*,” the reversion in fee passed: for the same lands may be said to be settled and unsettled; *viz.* settled so far as the use thereof is limited, and unsettled as to the reversion.

Chester v.
Chester, 3 P.
Wms. 56.

§ 101. Sir *John Chester*, on the marriage of his eldest son, settled lands of 800 *l. per annum* on himself for life, remainder as to part, to the wife of his son for life,

life, remainder to the first and other sons of that marriage in tail male, remainder to the son in tail general. And, being seised in fee of other lands in possession, in *Littleton, Marston, and Milbroke*, he devised all his lands, tenements, and hereditaments, in these three towns of *Littleton, Marston, and Milbroke, or elsewhere, not by him formerly settled, or thereby by him otherwise disposed of*, to trustees for the term of 100 years, upon the trusts therein mentioned, remainder to his younger son *John Chester*, in fee. The eldest son died, leaving six daughters; and the question was, whether the reversion of the estate settled on the eldest son should pass by this devise?

It was decreed by Lord *King*, assisted by Lord *Raymond*, and another Judge, 1st, That the word "*elsewhere*" was the same, as if the testator had said, he devised all his lands in the three towns particularly mentioned, or in any other place whatever: and that there was no reason to reject so plain, proper, and intelligible a word in a will as this, which probably was inserted to avoid the prolixity of naming the several other towns in which the premises lay; it being a great estate, and difficult, at the time of making the will, when the testator might be supposed to be *inops consilii*, and without his writings, to particularize all the towns. That the word "*elsewhere*" was, therefore, the most significant, sensible, and comprehensive word, that could be used for that purpose, equivalent to the meaning of them; and it would be of the most dangerous consequence, under pretence of construing this will and assisting the testator's intentions, to reject a word
so

so material to be made use of, both for the sake of brevity and security.

2d, That the words, “*not otherwise by me settled,*” could have excepted only that estate in the lands, which was otherwise before settled; whereas, it was plain, that the reversion in fee was not settled, and, therefore, ought to pass by the will. The reversion in fee of the lands in question not being settled, the lands, as to such reversion, were not settled; so that the same lands, in several respects, might be said to be settled and unsettled; viz. with regard to all the particular estates which were limited, the lands might be said to be settled, though, with regard to the reversion in fee, it might be properly said, that the lands were not settled: and the reversion in fee, which remained unsettled, was part of the old estate, whereof the owner continued seised.

Glover v.
Spendlove,
4 Bro.R. 337.

Freeman v.
D. of Chan-
dos, Cowp.
363.

§ 102. *Robert Tracey*, being seised of estates in the counties of *Gloucester* and *Worcester*; and also entitled to the reversion of certain estates in the counties of *Oxford* and *Wilts*, devised all and every his manors, messuages, lands, tenements, hereditaments, and premises, in the counties of *Gloucester* and *Worcester*, and elsewhere in the kingdom of *England*, to trustees, subject to certain charges thereon, and to certain limitations and estates to all his brothers, by his marriage settlement. The estates in the counties of *Gloucester* and *Worcester* were the only ones charged, or mentioned in his marriage settlement. The question was, whether the reversion in fee of the estates in *Oxfordshire* passed

passed by the will? It was contended that, from the words of the will, referring to the limitations of the estates in the counties of *Gloucester* and *Worcester*, and the charges thereon, it was manifest the testator had no other estates than those in contemplation, at the time of making his will. But the Court of King's Bench unanimously certified, that the reversion in fee of the estates in *Oxfordshire* and *Wiltshire*, passed by this devise.

§ 103. *Edward Atkyns*, having issue *Edward* and three younger children, and being seised in fee in possession of the manor of *Cotes*, and other lands therein, and near *Pinbury Park* in the county of *Gloucester*, expectant on the estates tail of three persons then living, made his will, and thereby devised as follows: "I give, " devise, and bequeath, all that the manor or lordship, " or reputed manor or lordship, of *Cotes* in the county " of *Gloucester*, with the rights, royalties, and appur- " tenances, and also all and every the messuages, farms, " lands, tenements, advowsons, and hereditaments " whatsoever, of me the said *Edward Atkyns*, situate, " lying, and being within or adjoining to the said ma- " nor or lordship; and also all that my capital messu- " age or tenement, and all and every my lands, tene- " ments, and hereditaments whatsoever, whether free- " hold or leasehold, situate and being at, or in, or near " *Pinbury Park*, or elsewhere in the said county of *Glou- " cester*, with their appurtenances; and all my estate, " term of years, and interest therein, unto and to the " use of my executors, their heirs," &c. upon trust to sell the same for the benefit of his younger children.

Atkyns v.
Atkyns,
Cowp.R.808.

Title XXXVIII. *Devise.* Ch. x. § 103—105.

Several years after the death of the testator, the reversion of the manor of *Sewell* came into possession; and a question arose between the heir at law and the younger children, whether the reversion in fee of the manor of *Sewell* did pass by the will of the testator. A case was made by order of Lord Chancellor *Thurlow*, for the opinion of the Court of King's Bench; who certified, that the reversion in fee of the manor of *Sewell* did pass, by the express words of the will of the testator, to the trustees in the will named.

The Lord Chancellor ordered, that the Judges certificate should be confirmed.

3 Bro. Parl.
Ca. 438.

From this order, an appeal was brought to the House of Lords; and a question was put to the judges, whether the reversion of the manor of *Sewell* passed by this devise? The Lord Chief Baron delivered the unanimous opinion of the Judges, that the reversion in fee of the manor of *Sewell* passed by this devise. The decree was affirmed.

§ 104. Where it is manifest, that a testator does not intend to devise a reversion by general words, it will not pass.

Ree v. Avis,
4 Term R.
605.

§ 105. A person, being seised in tail of an undivided fourth of an estate, and entitled to the reversion in fee of another fourth expectant on the determination of an estate tail, reciting that she was entitled to the first, devised it to *B. C.* in fee, and then directed
“ all the residue and remainder of her estate and effects
“ to

“ to be sold as soon as might be after her death, and
 “ her funeral expences to be paid thereout, and the
 “ overplus, (if any), to be divided between *D.*
 “ and *E.*” The court held, that the reversion did
 not pass : for, although those general words were suf-
 ficient to pass a fee, in order to answer the purposes of
 a will, yet in this case, they said, that it was manifest
 that this remainder was not in the contemplation of the
 testatrix when she made her will, it being only a re-
 version expectant on the determination of an estate tail,
 which her aunts might have barred, and the testatrix
 having, by the former part of her will, disposed of all
 the freehold estate, to which she supposed herself en-
 titled. They observed that it was clear, from the pur-
 pose to which a part of the produce of what she directed
 to be sold was to be applied, namely, the paying of her
 funeral expences, that she only meant to dispose of
 something which could be sold immediately ; and
 that this reversion might never have descended to her
 heirs.

§ 106. In consequence of the rule above stated,
 that general words in one part of a will may be re-
 strained by subsequent ones, it has been determined,
 that, although a testator uses words sufficient to carry
 a reversion, yet if a subsequent clause shews, that the
 testator did not intend to devise such reversion, it will
 not pass.

§ 107. *Audley Mervin*, on the marriage of his
 eldest son *Henry*, settled the manor of *Arlestown* on
 himself for life, remainder to his son *Henry* for life,

Test v.
Strong, 2 Bx.
 912.

remainder to the first and other sons of *Henry* in tail, &c. with the reversion in fee to the father.

Audley Mervin had issue three other sons, *Audley*, *James*, and *Theophilus*, and four daughters : and, being seised of other lands in fee-simple, he made his will, by which he devised all those lands whereof he was seised in fee-simple, in possession, to his wife, and also all other the lands, tenements, and hereditaments, in the said counties of *Tyrone* and *Meath*, or either of them, whereof he was seised in fee-simple, or of which any other person was seised, in trust for him.

There was a proviso inserted in this will, that if his sons *Henry* and *Audley* (who were his first and second sons), should both of them die without issue male, in the lifetime of his son *James*, (who was his third son), whereby the estate settled on his son *Henry*, on his marriage, should descend on his son *James*, that then his son *James* should not take any interest or estate in the lands, therein-before devised to him.

The question was, Whether the reversion in fee of the lands, which were settled on *Henry*, should pass by this devise ?

The Court of King's Bench in *Ireland* gave judgment, that the reversion in fee did pass ; but this judgment was reversed by the Court of King's Bench in *England*.

Lord *Mansfield*, in declaring the opinion of the Court, observed, that the words used by the testator, were certainly sufficient to carry the reversion in fee of the lands settled on *Henry*, if they had not been restrained by other words and expressions: and that the clause in the will, (besides several others), which directed that, in case *Henry* and *Audley* should die without issue male in the lifetime of his son *James*, whereby the estate settled on *Henry* should descend to *James*, then *James* should not take any estate in the lands devised to him, proved, to a demonstration, that the testator did not mean to devise this reversion: for, if he had, then it could never go to *James*.

A writ of error was brought in the House of Lords: and the Judges, having been consulted on this question, gave it as their unanimous opinion, that the reversion in fee did not pass by this devise; in consequence of which, the judgment of the Court of King's Bench of *England* was affirmed.

3 Bro. Parl.
Ca. 219.

§ 108. Lands which are in mortgage, and whereof the devisor has only the equity of redemption, will pass by the same words, which comprehend estates in possession; because lands mortgaged, are only considered as a pledge for securing the repayment of a debt, and remain in the mortgagor, for every other purpose.

What Words.
pass Mort-
gages and
Lands held
in Trust for
others.

§ 109. *John Philips* having mortgaged his estate in fee to *Elizabeth Knowling*, afterwards made his will, by which he gave all the rest of his goods, chattels,

Philips v.
Hele, 1 Rep.
in Cha. 101.

and lands, to *Ralph Philips* the younger, who filed his bill for the redemption of the premises.

The Court ordered a case to be referred to Baron *Turner*, who certified his opinion, that, according to the devise, the lands ought to continue with the plaintiff and his heirs, both in law and equity; and that the plaintiff had right to redeem the mortgage, and not the heir of the testator; which the Court decreed accordingly.

Crips v.
Gryfil, Cro.
Car. 37.

§ 110. It was formerly held, that lands mortgaged, might also be devised by the mortgagee, by the words "*all my mortgages.*" But, afterwards, the courts laid it down, that these words would only comprehend mortgages for years, and not mortgages in fee, especially if they were forfeited.

Wilkinson v.
Merryland,
Cro. Car 447.

§ 111. A person seised of divers lands in *A. B.* and *C.*, the lands in *C.* being in him by mortgage and forfeited, made his will; and, after devising the lands in *A.* and *B.* to several persons and their heirs, he gave all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods, whereof he was possessed, to his wife, after his debts and legacies were paid, and made her his executrix. The court doubted, whether the estate in mortgage passed to the wife; because the word "*mortgage*" was coupled with personal things, and because the testator used the words "*whereof I am possessed.*"

§ 112. A person who was seised of lands in fee, and of mortgages in fee, devised all his lands to *A. B.*, and then gave several legacies, and said—all the residue of my personal estate I give to my executor. It was resolved, that the mortgage went to the executor. But, if the testator had only devised his lands, without giving any legacies, and had bequeathed the rest of his personal estate to his executors, there, perhaps, the mortgaged lands would have passed to *A. B.*, for, else, there would be nothing to answer and make sense of the clause “all the residue;” for that implied, that he had already devised some part of his personal estate, or, at least, it shewed that he intended part of it should have passed.

Wynne v. Littleton,
1 Vern. 3.

§ 113. This doctrine, however, is now entirely altered: for, the nature of mortgages being at present clearly understood, and the whole transaction, till foreclosure, being considered as a personal engagement only, in which the money is the principal, and the conveyance of the land only an accessory, it is now established, that neither the general words, “lands, “tenements, and hereditaments,” nor any other words particularly appropriated to the description of real estates, and never applied to personal property, will carry mortgages in fee, if the testator has other property, to which those words may be properly applied.

Vide Tit. 15.
ch. 2. s. 35.

§ 114. A person being seised of several manors, and of a great personal estate, made his will; and, after devising part to his wife for life, gave *all* other his lands, tenements, and hereditaments, out of settlement, to his nephew. The testator, afterwards, foreclosed,

Litton v. Lady Russell,
2 Vern. 621.

and got releases of the equity of redemption of some mortgages in fee. And one of the questions in this case was, whether these mortgages passed by the will, under the words "*lands, tenements, and hereditaments.*" And it was unanimously agreed by the Lord Chancellor, assisted by the Master of the Rolls, and two other Judges, that mortgages in fee, although forfeited when the will was made, did not pass by these general words.

1 Atk. 605.

§ 115. If a testator has no other landed property, answering the description given in his will, in point of situation and circumstances, except mortgages, they will pass by general words, though not particularly adapted to the subject.

Clarke v.
Abbot, 2 Ab.
Eq. 606.

§ 116. A person, possessed of a mortgage of the *Swan Inn* at *Chelsea*, made his will, and thereby devised to *A.* and his heirs "all his freehold messuages, "and garden grounds at *Chelsea.*" It was held by Lord *Hardwicke*, on a question whether the mortgaged interest would pass by this description, that, as it did not appear that the testator had any lands there, it certainly would. Yet it is observable on this case, that the word "*freehold*" could with less propriety be applied to the case of a mortgage, than the words "*lands, tenements, and hereditaments*;" the latter being much more general in their nature, and more frequently used as sweeping terms, to comprise all property not particularly described.

§ 117. Various

§ 117. Various opinions have been entertained within these few years respecting the question, whether a general devise passes lands whereof the devisor is only mortgagee or trustee. In a case before Lord *Rosslyn* in 1800, it was contended, that general words did not pass a trust estate, unless there appeared to be an intention that they should pass; to which, his Lordship said, that was certainly the understanding: but, perhaps, the most convenient rule would have been the reverse; as it might be more easy to find a devisee than an heir.

1 Inst. 205 a,
n. 1.

Att. General
v. Buller,
5 Vef. Jun.
339.

Lord *Redesdale*, who was then Attorney General, (*amicus curiæ*), suggested that the rule, that a trust estate should pass by a general devise, would not be the most convenient, from the frequent instances of estates tail created by general words, in consequence of which, the legal estate might get into an infant, fettered with an entail.

§ 118. In a subsequent case before Lord *Eldon*, his Lordship held, that a trust estate would pass by a general devise, unless an intention to the contrary could be inferred from expressions in the will, or purposes or objects of the testator. The Master of the Rolls had determined, that a trust estate passed by the general words of a will; and, on an appeal to Lord *Eldon*, his Lordship said,— “ I am disposed, in this cause, to con-
“ cur with the opinion of the Master of the Rolls;
“ meaning rather to state my judgment, that the rule
“ is not, that in every case where general words are
“ used, the property shall or shall not pass, but that,
“ in

Braybroke v.
Inskip, 8 Vef.
Jun. 417.
Roe v. Keade
8 Term R.
118.

“ in each case, you must look at every part of the will,
 “ for the intention with regard to such property. I do
 “ do not know in experience any case, in which the
 “ proposition is laid down so strong, one way or the
 “ other, as it was laid down in the *Attorney General*
 “ v. *Buller*. - I know no case, which states as the rule,
 “ that trust estates shall not pass, unless the intention,
 “ that they should pass, appears; and I incline to
 “ think they will pass, unless I can collect from ex-
 “ pressions in the will or purposes or objects of the
 “ testator, that he did not mean they should pass.
 “ In this case there is no circumstance, except one,
 “ that I shall observe upon, denoting any special in-
 “ tention. It is the case of a dry trust; all the debts
 “ and legacies being long paid, as I now understand.
 “ There was therefore a pure legal estate in the tes-
 “ tator; nothing remaining to be done but to re-
 “ convey. There is no one circumstance in this will,
 “ to cut down the general effect upon any notion of
 “ intention; unless it can be said, that where he
 “ meant to create a trust, viz. as to the personal
 “ estate, he joins another person with his wife; giving
 “ the real estate to her alone. But that is too thin
 “ an evidence of intention to afford much inference.

“ The result is this: a will containing words large
 “ enough; and no expression in it authorizing a nar-
 “ rower construction than the general legal construc-
 “ tion; nor any such disposition of the estate as is
 “ unlikely for a testator to make of any property not
 “ in the strictest sense his; as complicated limitations:
 “ nor any purpose at all inconsistent with as probable
 “ an

“ an intention to vest it in his wife, as devisee, as to
“ let it descend. I know of no case, in which a mere
“ devise in these general terms, without more, where
“ the question of intention cannot be embarrassed by
“ any reasoning upon the purpose or objects, or the
“ person of the devisee, has been held not to pass the
“ trust estate. If there was any such case, I would
“ abide by it; but I do not feel strong enough, upon
“ authority or reasoning, to dissent from the decision
“ of the Master of the Rolls.”

TITLE XXXVIII.

DEVISE.

CHAP. XI.

Construction.—What Words create an Estate in Fee.

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| <p>§ 3. <i>Any Words indicating an Intention to give the whole Interest.</i></p> <p>22. <i>Effect of an introductory Clause.</i></p> <p>25. <i>Effect of the Word Estate.</i></p> <p>37. <i>All the Rest and Residue of my Estate.</i></p> <p>43. <i>Whatever else I have not disposed of.</i></p> <p>45. <i>Remainder.</i></p> <p>47. <i>Reversion.</i></p> <p>49. <i>Devise on Condition of paying a Sum of Money.</i></p> | <p>54. <i>Devise charged with Debts and Legacies.</i></p> <p>60. <i>Devise charged with an annual Payment for ever.</i></p> <p>64. <i>Devise charged with an annual Payment for Life.</i></p> <p>71. <i>Exception.—Where the Charge is on the Rents and Profits.</i></p> <p>72. <i>Devise to Trustees for Purposes requiring a Fee.</i></p> <p>76. <i>A general Devise passes the whole Interest in a Chattel.</i></p> |
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Section I.

WITH respect to the words, which are necessary to denote the quantity of estate or interest, intended to be given by the testator to the devisee, the courts, both of law and equity, in conformity to the general rules of construction already stated, do not require in a devise, those legal and technical words, which in a deed are deemed absolutely necessary to the creation of particular estates; but will carry the intention of the testator into effect, if sufficiently declared, however defective the language may be.

§ 2. The quantity of estate intended to be given, may be described either by express words, or by reference to another devise; and, therefore, if a testator devises *Blackacre* to *A. B.* and his heirs, and *Whiteacre* to *C. D.* to hold in the same manner as *A. B.* holds *Blackacre*, *C. D.* will take an estate in fee-simple in *Whiteacre*.

Perk. f. 561.

§ 3. It has long been settled, that the word “*heirs*” need not be used in a will to create an estate in fee; but that any other words, which sufficiently shew the intention of the testator to give the whole of his interest in the thing devised, to the devisee, will have the same effect.

Any Words shewing any Intention to give the whole Interest.
1 P. Wms. 77.

§ 4. Thus, it was settled so early as in the reign of *Edw. 3.*, that a devise to a man *in perpetuum*, gave him an estate in fee. It is the same, where the devise is to a person in fee-simple, or to him and his heirs: so, of a devise to a man and his successors, the word “*successors*” being deemed equivalent to heirs; for *hæres succedit patri*.

Bro. Ab. Devise, pl. 33.
1 Inst. 9 b.
1 Rep. 85 b.

§ 5. It is said by *Perkins*, sect. 557. that if lands be devised to *J. S.* to hold to him and his assigns, he will take a fee: but Lord *Coke* says, if the devise be to a man and his assigns, without saying *for ever*, the devisee hath but an estate for life.

1 Inst. 9 b.

§ 6. A devise to *A. et sanguini suo* will pass a fee; for the blood runs through the collateral, as well as the

Idem.

the lineal line: but a devise to a man, *et semini suo*, only gives him an estate tail.

Widlake v.
Harding,
Hob. 2.

§ 7. Where a person, seised of a house and lands, demised them for 99 years, and then made his will, by which, he devised to *B.* his house and all his lands for 99 years, and added these words, "*the said B. to have all my inheritance, if the law will allow:*" it was held, that *B.* took a fee.

Loveacres v.
Blight, Cowp.
352.

§ 8. The words, "*freely to be enjoyed,*" have been held to pass an estate in fee: as, where after an introductory clause, shewing an intention to dispose of his whole estate, a person gave to his sons *T. M.* and *R. M.* all his lands and tenements, "*freely to be enjoyed and possessed alike,*" it was held that a fee passed.

Green v.
Armistead,
Hob. 65.

§ 9. Where *A.* seised of lands in *W.* devised them to his son *B.* for his life, and then to remain to *C.* the son of *B.*, except *B.* purchased another house with so much land as in *W.* for *C.*, and then *B.* should sell the lands in *W.* as his own. It was held, that *C.* took a fee in the lands in *W.*, as *B.* did not make any purchase of any other lands; for the word "*purchase*" imported, in common parlance, an absolute purchase in fee.

Webb v.
Hearing,
Cro. Ja. 415.
Willes Rep.
165. Vide
infra ch. 12.

§ 10. A devise to a person and his heirs, and, if he dies without heirs, that it shall remain to a stranger, gives an estate in fee to the first devisee, and the remainder

remainder is void ; because no remainder can be limited after an estate in fee-simple.

§ 11. Lord *Coke* says, that a devise to a person, to give and sell, passes an estate in fee ; and this doctrine has been confirmed by several determinations. 1 Inst. 9 b.

§ 12. A person devised to *A.* to give, sell, and do therewith at his will and pleasure ; held, that the devisee took an estate in fee-simple. Bro. Ab. Tit. Devise, pl. 39.

§ 13. A person devised lands to his wife, to dispose and employ them on her and his son at her will and pleasure, and it was held by *Dyer, Weston, and Welshe*, that she took an estate in fee. Moor 57.

§ 14. Where a person devised in these words ; I “ give my houses in *Broad Street* to *Mary Timewell* “ for her own use, to give away at her death to whom “ she pleases :” Lord *Hardwicke* held, that these words created an estate in fee. Timewell v. Perkins, 2 Atk. 102.

§ 15. A person devised to *Agnes Pearson*, who was his heir at law, for and during her life to be enjoyed by her without molestation, and, after her death, to her lawful issue ; and, if she should have no issue, that she should have power to dispose thereof at her will and pleasure. Goodtitle v. Otway, 2 Will. Rep. 6.

¶ After argument at the Bar, the whole Court was clearly of opinion, that *Agnes* had an estate in fee-simple

simple by the will, as the contingent remainder to the issue never vested. That the testator, by giving her power to dispose thereof at her will and pleasure, in case she had no issue, had given her a fee-simple.

Vide ch. 13.

§ 16. Where only an estate for life is devised in the first instance, with a power of disposing of the inheritance, there the devisee will take only an estate for life, with a power of giving the inheritance to the persons pointed out by the will.

Cole v. Rawlinson, 3 Bro. Parl. Ca. 7.

§ 17. A devise of all a person's right, title, and interest, will pass a fee; as, where a woman being tenant for life of a house, remainder in tail to her son, with the reversion in fee in herself, devised all her right, title, and interest in the house, to her son; it was resolved, that these words passed the reversion to the son in fee.

Andrew v. Southhouse, 5 Term R. 292.

§ 18. A person devised all his part, share, and interest, of and in the estates of *T. C.* unto his sister for life, and, from and after her decease, he gave the same to *E. S.* Lord *Kenyon* held, that these words passed a fee; and said, there was no doubt but that the word "*interest*" would pass a fee.

Newland v. Shephard, 2 P.Wm. 194.

§ 19. A person devised the residue of his real and personal estate to trustees, their heirs, executors, and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his only daughter *N.* as should be living at the time of his decease, until his

said grandchildren should attain the age of 21 years, or be married ; and made no farther disposition of his estate, but only directed, that, if all his trustees should die, in such case, his son-in-law *N.*, the husband of his daughter *N.* should be a trustee. Lord *Macclesfield* said, the intention was most plain, that the grandchildren should have the surplus both of the real and personal estate, after the age of 21 : for it could not be imagined, that the testator should shew a concern for his grandchildren, when they did not want it, and leave off that care at the only time when they could be supposed to stand in need of it ; namely, when they came of age, and were marriageable. Besides, it was plain the testator gave all from the heir at law, by vesting the whole estate in fee, as well the legal property as the personal estate, in trustees ; which would not have been done, had any thing been intended to remain to the daughter and heir. Not only the interest, but the produce, of the real and personal estate, was to be applied by such trustees : and, to help this plain intention of the testator, the word “ *produce* ” should be taken in the larger sense ; and then it would signify whatever the estate would yield by sale or otherwise. And this case was the stronger, in regard the son-in-law was to be a trustee in case the other trustees should all die ; but it could not be intended, that the son-in-law should be a trustee for himself, or for what himself would be entitled to, should it come to his wife.

It is reported in *Atkins*, that Lord *Hardwicke* said, 3 Atk. 316. he could see no reason to approve of this case ; but it

has been admitted as an authority in two subsequent cases.

Peat v.
Powell,
Amb. 387.

§ 20. *Giles Powell* devised all the rest, residue, and remainder of his real and personal estate, to two trustees, in trust for his younger son *Giles*, till he attained 21, and then the trust was to cease. Lord Keeper *Henley*, after taking time for consideration, delivered his opinion, that *Giles* was intended to have the whole beneficial interest in the residue of the real and personal estate; and that the trust was to continue only during his minority. That it was the same as if the testator had said, “I give the estate to trustees, in trust for *Giles*, till he attain 21, and then to *Giles* and his heirs.” That *Shephard v. Newland*, 2 P. Wms. 194, was a much stronger case.

Challenger v.
Shephard,
8 Term Rep.
597.

§ 21. Upon a case sent out of Chancery for the opinion of the Court of King's Bench, the facts were; a person devised to trustees and their heirs a certain estate, in trust for *Joan* the wife of *John Pippet*, and *James* her son; one moiety of the profits to be applied by the trustees to the separate use of the said *Joan*, and the other moiety to be laid up, or otherwise improved, till the said *James* should arrive at his age of 21 years. And his will was, that if the said *Joan* should die during the minority of the said *James*, the trustees should lay up the increase and profits of the mother's moiety for the benefit of her son; and after the decease of the said *Joan*, should permit and suffer the said *James* to enter upon and enjoy the whole, as soon as he attained the age of 21 years.

It

It was insisted, that *James Pippet* took only an estate for life, because no words of inheritance were added to the devise to him: that the argument drawn from the cases in *Peere Williams* and *Ambler*, that the beneficial interest which the devisee took, was coextensive with the legal interest devised to the trustees, was untenable; because it tended to shew, that in all cases where an estate was given to trustees and their heirs, in trust, the *cestuique trust* must take a fee. But the estate of the *cestuique trust* was not to be measured by the estate devised to the trustees, and a contrary doctrine had at all times prevailed, namely, that the heir at law takes whatever is not expressly devised away from him. It was said in reply, that it was not necessary to contend that the heir at law would take whatever was not devised away from him, because here the fee was expressly given to the trustees, and, by that devise, the testator had manifested his intention that the heir at law should not take. Then, if the estate did not descend to the heir at law, the question was, to whom it was devised? and the two cases cited from *Peere Williams* and *Ambler*, shewed, that the law had already put a construction on a will framed like the present, and had said, that the *cestuique trust* should take a beneficial interest in the whole that was devised to the trustees. The Court of King's Bench gave no opinion when the case was argued, but certified, that *John Pippet* took a beneficial interest in fee.

§ 22. Where the introductory clause prefixed to a devise of real estate shews, that the testator intended to depart with his whole property, the subsequent words

Effect of an
Introductory
Clause.

R 2

will,

will, if possible, be construed so as to pass an estate in fee, and to prevent an intestacy, as to any part of his property.

Ibbetson v.
Beckwith,
Forrest Rep.
157.

Frogmorton,
v. Holyday,
3 Bur. 1618.

§ 23. A testator began his will in these words: "As touching my worldly estate, wherewith it has pleased God to bless me, I give devise, and dispose of the same in the following manner." He then gave to his mother all his estate at *N.* with all his goods and chattels, as they then stood, for her natural life, and to his nephew *T. D.* after her death, if he would but change his name. If he did not, then he gave him only 20 *l.* a year, to be paid him for his life out of *N. Close*, and the farm held at *R.*, which he gave her upon his nephew's refusing to change his name, to her and her heirs for ever. It was decreed by Lord *Talbot*, that the nephew took an estate in fee; for the intent plainly appeared to pass the inheritance.

Frogmorton
v. Wright,
3 Wils. Rep.
414.
Infra, ch. 13.

§ 24. The determination, in this case, was not entirely founded on the force of the introductory clause: and, in some modern cases, the courts have refused, in the construction of a will, to connect the introductory clause with that which contained the devise.

Effect of the
Word
"Estate."
Tit. 1. f. 18.
1 Inst. 345 *a.*

§ 25. As the word "*estate*" signifies such an interest as the tenant hath therein, so that, if a man grants all his estate in *Dale* to *A.* and his heirs, every thing which he can possibly grant will pass thereby; it has been long established by analogy from this principle, that, in a will, the words, "*all my estate*," pass a fee-simple.

§ 26. A

§ 26. A person devised to his wife his whole estate, paying debts and legacies. Adjudged, that the wife took a fee by force of the words, “*my whole estate :*” for these words extended to his land, according to the common parlance, and also to all his estate in the land.

Johnson v.
Kerman,
1 Roll. Ab.
834.

§ 27. In the case of *Bridgewater v. Bolton* it was resolved, that the fee-simple of the rents passed, or at least the whole estate of the devisor therein ; for “*all his estate*” was a description of his fee. In pleading a fee-simple, no more is said than, *seisitus in dominico suo, ut de feodo :* and, in formedon or other action, if a fee-simple be alledged, it is said, *cujus statum* the demandant has now.

Ante ch. 10.

§ 28. A person having copyhold estates which he had surrendered to the use of his will, devised in these words—“*All other my estate of what nature soever I give to my wife Joan, whom I make my executrix to pay my debts and legacies therewith.*” Resolved that the inheritance passed.

Lane v.
Hawkins,
2 Show. 388.

§ 29. In the case of *Shaw v. Bull*, Lord Ch. Just. Trevor said—“*In the construction of wills generally, the words, my estate, the residue of my estate, or, the overplus of my estate, may well pass an inheritance, where the intent is apparent to pass it. But such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will, and circumstances of the case. For if the words be indifferent to*

12 Mod. 596.

“ real and personal estate, or may be applied to per-
 “ sonal alone, there the heir at law is not to be disin-
 “ herited by the implication of such words, or by
 “ any implication at all, but what is a necessary one.”

Barry v.
 Edgeworth,
 2 P.Wms.
 523.

§ 30. A person devised all her land in *Upper Catesby*, with all their appurtenances, to *W. Edgeworth*. The Master of the Rolls decreed, that the devisee took a fee; because it had long been settled that the word “*estate*” was sufficient in a will to pass a fee.

Baillis v. Gale,
 2 Ves. R. 48.

§ 31. A testator devised to his wife, all that estate he bought of *Mead*, for so long as she should live; and in another clause says—“ I give to my son *C. G.* all that estate I bought of *Mead*, after the death of my wife.”—The question was, whether *C. G.* took an estate in fee or not.

Lord *Hardwicke*—“ This case arises on a subject,
 “ which admits of a very large field; and on which
 “ there is a variety of cases, and a variety in those
 “ cases, as to the extent and force courts of law and
 “ equity have given to particular words in wills, on
 “ which this question has arisen. But there is no
 “ doubt at all, as to the present case; and, as to what
 “ was thrown out, of favour in cases of this kind to an
 “ heir at law, it is to be laid out of the case; because
 “ by this will (whatever is the construction) the heir
 “ is disinherited certainly; which is clearly shewn to
 “ be intended by the sweeping devise of all his real
 “ estate.

“ On the first question I am of opinion that both
 “ the thing itself, and the estate, property, and inte-
 “ rest, the testator had, passed by the devise. Several
 “ questions have arisen in courts of law and equity on
 “ devises of this kind; but all the latter determina-
 “ tions have extended, and leaned as much as possible,
 “ to make words of this kind comprehend, not only
 “ the thing given, but also the estate and interest the
 “ testator had therein; and for a very plain reason.
 “ It commonly happened in wills made by the testator
 “ himself, being *inops consilii*, not constant of the
 “ law; of which kind this will is: and, when it is
 “ so, it is well known, that when one gives, especi-
 “ ally among his children, such and such lands, de-
 “ scribing the lands only, he most commonly means
 “ the fee-simple of it; unless where he gives it for
 “ life. Where he means to give a thing only for a
 “ particular interest, as for life or years, common
 “ sense points out to add those limiting words: and
 “ the generality of people, giving without such limi-
 “ tation, mean to give it absolutely, though the word
 “ *heirs*, or such words are not added. Where words
 “ of limitation are not added, the law is so tied down,
 “ that the rule is, it can give only an estate for life;
 “ but most frequently that is contrary to the intent of
 “ the testator, especially when it is among children;
 “ but the law cannot help it; it must be so pursued,
 “ and it is better that should be so, than the rule
 “ broke in upon. But, in the last cases, the court
 “ has endeavoured to make “*estate*” amount to a
 “ devise of the whole interest, unless some words
 “ restraining or limiting that general sense. Accord-

“ ing to Lord *Holt*, “ *estate*” is admitted to be suffi-
 “ cient to make a description, not only of the land,
 “ but of the interest in the land. But it is objected
 “ the pronoun *my* is not added; there was no occasion
 “ for it. It was necessary he should use such words,
 “ as point out the whole interest he had in the land,
 “ which is sufficiently done by the other words: for
 “ he bought of *Mead* the land, and the fee-simple in
 “ the land, which is agreeable to the construction of
 “ the word “ *estate* ;” being sufficient to describe the
 “ thing and the interest therein, as it is in the case of
 “ *all my estate*. As to the objection from the devise
 “ to the wife, he did not intend a fee there: but that
 “ is no argument, that he did not intend the word
 “ *estate*” to comprise, not only the thing, but the
 “ interest and property in the thing. Persons, not
 “ knowing the law, know when to add a restriction
 “ to what they give: therefore, his adding that to
 “ his wife’s devise, shews, he was apprehensive this
 “ word “ *estate*” would pass the whole, otherwise;
 “ and rather confirms and strengthens the subsequent
 “ clause. But another argument may be drawn on
 “ this will; that the testator is dividing his estate
 “ among his wife and children; and it is inconceiv-
 “ able he should intend to give the provision, he
 “ meant for his son *Charles*, by a reversion for life,
 “ after the death of his wife, which greatly strengthens
 “ the construction of all these wills; and on this rea-
 “ son I am of opinion, this is stronger than *Ibbetson v.*
 “ *Beckwith*: for there was a locality described, which
 “ is what makes the obligation to this large construc-
 “ tion. It makes no difference, whether it is “ *all*
 “ *my*

“ my estate at Northwich close,” or all the estate; for
 “ it must be construed with a *videlicet*, which is as
 “ local; and this is a devise of the same kind
 “ exactly.”

§ 32. A person, being seised in fee of a house and
 land at *Braywick* in the county of *Berks*, devised the
 same in the words following—“ I give and bequeath
 “ to Mrs. *Martin* my estate at *Braywick*, *Berks*.”—
 It was contended, that these words did not pass a fee,
 for want of the word “ *all* :” but the court held that
 the devisee took a fee.

Holdfast v.
Martin,
 1 Term R.
 411.

§ 33. The word “ *estates*” is considered as equivalent to the word “ *estate* ;” unless other words are added to express a different intention.

§ 34. A person, seised of shares in the corn-market
 of the city of *London*, devised to his nephew the income of his shares in the corn-market, for his natural life; and all the rest of his estates, with all monies in the stocks, &c. to be divided in equal shares to *Elizabeth Snow*, &c. share and share alike. It was resolved, that the last clause comprehended the reversion of the shares in the corn-market, and carried the absolute inheritance in them to the devisees *Elizabeth Snow*, &c.

Fletcher v.
Smiton,
 2 Term R.
 656.

§ 35. The words “ *testamentary estate*” will also pass an estate in fee-simple, where there is an introductory clause, indicating an intention to dispose of all the testator’s property.

Smith v.
Coffin,
 2 H. Black.
 R. 444.

§ 36. Where

Ch. 13.

§ 36. Where the word “*estate*” is used only for the purpose of describing the local situation of the lands devised, it will not have the effect of passing an estate in fee, as will be shewn in a subsequent chapter.

All the rest
and residue of
my Estate.

§ 37. The words, “*All the rest and residue of my real and personal estate,*” will in most cases be deemed sufficient to pass an estate in fee-simple.

Murray v.
Wife,
Prec. in Cha.
264.
2 Vern. 564.

§ 38. *A.* devised 50 *l.* to his heir at law, and then gave all the rest and residue of his real and personal estate to his wife. It was decreed that the wife took an estate in fee-simple in the real estates of the testator.

Beachcroft v.
Beachcroft,
2 Vern. 690.

§ 39. A will was worded thus:—“ I do by this my
“ will dispose of such worldly estate, as it hath pleased
“ God to bestow on me. First, I will that all my
“ debts be paid and discharged; and, out of the re-
“ mainder of my estate, I give and bequeath unto my
“ wife 300 *l.* My mind is, that my wife have one
“ moiety of what is left after my debts paid.”—The
question was, whether a moiety of the real estate
passed to the wife in fee, or only half the personal
estate? And it was decreed, that the wife took a
moiety of the real estate in fee.

Farmer v.
Wife, . . .
3 P. Wms.
295.

§ 40. A will was made thus:—“ As to all my tem-
“ poral estate with which it has pleased God to bless
“ me, I dispose of the same as follows.” Then there
are several bequests; and then come these words.
“ And all the rest of my estate, goods and chattels
“ whatsoever, real and personal, I give to my beloved
“ wife.”

“ wife.”—Adjudged, that the words in this will were the same as if the testator had said, “ I devise the rest “ and residue of my temporal estate,” which therefore passed a fee-simple.

41. § A person devised all the rest, residue, and remainder of his goods, chattels, and personal estate, together with his real estate, not therein before devised, to his wife. It was held by Lord *Hardwicke*, that the words, “ together with my real estate,” carried the land and the inheritance.

Ridart v.
Pain,
3 Atk. 486.
1 Ves. 10.

§ 42. A person began his will thus—As to all my temporal estate wherewith it hath pleased God to bless me, I give and devise the same as follows—Then gave several legacies to *A.* and directed him to sell all or any part of his real and personal estate for the payment of his debts and legacies, and concluded his will with this residuary devise. —“ As to all the rest of my “ goods and chattels, real and personal, moveable and “ immoveable, as houses, gardens, tenements, my “ share in the copperas works, &c. I give to the said “ *A.*” without making use of the word *estate* or any words of limitation whatever.

Grayson v.
Atkinson,
1 Will. R.
333.
2 Ves. 51.

Lord *Hardwicke* doubted at first, but was afterwards clearly of opinion, as the testator had a fee, that *A.* took a fee.

§ 43. The words, “ whatever else I have not disposed of,” will pass an estate in fee.

Whatever else
I have not
disposed of.

Ropewell v.
Ackland,
1 Salk. 239.

§ 44. Thus, where a person devised his manor of *B.* to *A.* and his heirs, and then proceeded: “*Item,*” “*I devise all my lands, tenements, and hereditaments,*” “*to the said A.*” *Item,* “*I devise all my goods, and*” “*chattels, money and debts, and whatever else I have*” “*not before disposed of, to the said A.*” he paying my “*debts and legacies.*” Lord Ch. Just. *Trevor* held that, under the concluding clause, whatever he had not disposed of, an estate in fee passed.

Remainder.

§ 45. If a testator devises the whole remainder of his lands, these words will pass an estate in fee simple.

Norton v.
Ladd, Lutw.
761.

§ 46. A person devised to his sister, and after her decease, the whole remainder of his lands to his brother, if he survived her. Adjudged, that these words could not extend to the quantity of the land, but to the quantity of estate in the land; for the whole land was given to the sister for life, so there could be no remainder of that; therefore, it must be the remainder of the estate in the land, and by consequence a fee-simple passed.

Vide Jackson
v. Hogan,
Ante c. 10.

Reversion.

§ 47. The word *reversion*, is also sufficient, in most cases, to pass an estate in fee-simple.

Bailis v. Gale,
2 Vef. 48.

§ 48. A person devised in these words.—“*I give*” “*to my son C. G. the reversion of the tenement my*” “*sister now lives in, after her decease, and the rever-*” “*sion of those two tenements now in the possession of*” “*J. C.*”

Lord *Hardwicke* said, the word *reversion* passed the fee. The interest which the testator had in it was, the reversion in fee he had in himself, expectant on those leases he had granted, whether for life or for years. Reversion was a right of having the estate back again, (which created an interest) when the particular estate determined. And, according to *Lutwich* 761, a devise of a reversion passed a fee. There it was a devise of the whole remainder. Reversion was descriptive of that right of reverter by way of eminence, that was in himself, consequently there was no ground to split or divide it: for, giving the reversion gives the whole reversion, unless words are added, limiting or restraining the interest. Here also occurred another argument, from his making a division of his estate among his children, that it was extraordinary he should give his children a dry reversion, when the antecedent estate might continue longer than their lives; which strengthened the argument, that they should have as liberal a construction as the law would allow.

Norton v. Ladd,
Ante f. 45.

Vide *Peiton v. Banks,*
1 Vern. 65.
contra.

§ 49. It is a rule, long since established in the construction of wills, that if a person gives lands to another by will, with a direction that the devisee shall pay a gross sum out of it, the devisee will take an estate in fee, without any other words; though the sum directed to be paid, should not amount even to a year's rent of the land. This construction is founded on the principle, that a devise of land shall, in all cases, be intended for the benefit of the devisee; now, if a devisee was, in cases of this kind, only to take an estate for life, he might die before he received from
the

Devise on
Condition of
paying a Sum
of Money.
1 Inst. 9 b.
n. 2.
3 Rep. 21 a.
Cowp. Rep.
841.

the land the gross sum he had paid, and consequently be a loser by the devise.

Collier's Case,
6 Rep. 16 a.

§ 50. A testator devised lands to his brother, paying to one person 20 s. and to others small sums, amounting to 45 s. in all: the land was of the value of 3 l. *per annum*. Adjudged, that the brother took an estate in fee.

Wellock v.
Hammond,
Cro. Eliz.
204.

§ 51. *T.W.* devised copyhold lands, of the nature of borough-*English*, which he had surrendered to the use of his will, to *John* his eldest son; paying 40 s. to each of his brothers, and sisters. Adjudged, that *John* took an estate in fee.

Moore v.
Price,
3 Keb. 49.

§ 52. A person devised all his estate to *A.* paying forty pounds a piece to his sisters. Adjudged a fee-simple; and it appearing that the personal estate was not sufficient to satisfy legacies, it must consequently be intended his real estate. Besides the devisee was not executor, and therefore it could not be intended of the personal estate.

Reeves v.
Gower,
11 Mod. 208.

§ 53. *A.* by his will devised lands to *B.* and then bequeathed legacies; and gave five pounds to *C.* and directed *B.* to pay it, but gave him two years for that purpose; and the jury found the land to be worth fifty shillings a year.

It was adjudged that *B.* took a fee, for that the devise was of a sum in gross, and a *debitum in præfenti, solvendum in futuro*. And it was a sum certain to be paid

paid to *B.* at all adventures, whether the land yielded full five pounds or not, and so not like the cases where the sum devised was to arise out of profits

§ 54. A devise of lands, charged with the payment of debts and legacies, will, for the same reason, pass an estate in fee simple.

Devise charged with Debts and Legacies.

§ 55. A person devised to his brother *Richard*, all his lands, tenements, and hereditaments, and whatever else he had in the world, and made him executor; desiring him to pay his debts and legacies. Adjudged on a special verdict, that the devisee took an estate in fee.

Ackland v. Ackland,
2 Vern. 687.

§ 56. *A.* seised of lands in fee made his will, and gave his cousin *B.* 20*l.* to be paid out of his lands within one year; and after other legacies he gave all his lands to *Richard* generally. Adjudged that *Richard* took an estate in fee.

Freak v. Lee,
3 Show. R.
38.

§ 57. A will was made in these words. “ All the
“ rest, residue, and remainder of my messuages, lands,
“ tenements, hereditaments, goods, chattels, and per-
“ sonal estate whatsoever, my legacies and funeral
“ expences being thereout paid, I give, devise, and
“ bequeath unto my sister *J. D.*; and constitute and
“ appoint her my executrix, and residuary legatee of
“ this my will.”

Doe v. Richards,
3 Term R.
356.

Lord *Kenyon* said, That the first words alone were not sufficient in law to carry a fee; but that he relied

on

on the words immediately following, “ my legacies and “ funeral expences being thereout paid,” as sufficient for that purpose ; for the fund, which was to answer those demands, ought to be as ample as possible. Those charges extended to, and were to be taken out of, the property which was before given to the residuary legatee : and, if that devise did not comprise the whole of the devisor’s estate, the interest as well as the land, the legacies and funeral expences might not be paid.

Vide Moore
v. Denn,
infra ch. 13.

Doe v.
Holmes,
8 Term R. 1.

§ 58. A person devised in these words, “ I give and bequeath my freehold house, with the appurtenances, &c. and all the furniture thereto belonging, to *Elizabeth Gibson*, whom I make executrix of this my last will, she paying all my just debts and funeral expences and legacies before mentioned, twelve months after my death. I likewise leave to the said *E. Gibson* all the rest and residue of my personal estate,” &c. The Judge before whom the cause was tried being of opinion that the devisee took a fee by reason of the latter words in the devise, “ she paying all my debts,” non-suited the plaintiff. And on a motion to set aside that non-suit, Lord *Kenyon* said, “ I am clearly of “ opinion that the direction given at the trial was perfectly right. In cases of this kind, the question has “ always been, whether the charge is to be paid only “ out of the rents and profits of the estate, or whether “ it is to be paid by the devisee at all events ; in the “ former case the devisee only takes an estate for life, “ but in the latter he takes a fee : otherwise he might “ be a loser by the devise. Here the devisee is bound “ to pay the debts and legacies at all events, and the “ charge

“ charge is thrown on her in respect of the real estate.
 “ The personalty is given to her by the next clause in
 “ the will.”

§ 59. A person devised in these words, “ All the
 “ rest I have in the world, both houses, lands, goods
 “ and chattels, stock in trade, and all other things
 “ that belong or may belong to me, I give to my
 “ present wife *Joan Pascoe*, my executrix, *so that* she
 “ shall sell my stock in trade, and household goods ;
 “ and if these will not pay the debts, she sell next
 “ *the house of fee in Penzance*, and not *Prospednick* ;
 “ *so that* my executrix shall pay in good time all law-
 “ ful debts, that shall appear.”

Goodtitle v.
 Maddern,
 4 East 496

Lord *Ellenborough* said, it was clear that the execu-
 trix and residuary legatee took a fee in the premises in
 question ; for she was charged with payment of all the
 debts, and she had the land devised to her, as well as
 the personal estate, all in the same clause, in order to
 enable her to satisfy that charge. And she could not
 have less than a fee in it, because she was empowered to
 sell it, which she could not do without having the fee.
 As to what was said in the will, relative to the sale of
 the stock in trade and household goods in the first
 instance, for payment of debts, and if those were not
 sufficient, then the house in *Penzance*; that was merely
 directory to her, to apply the personalty first for pay-
 ment of debts, before the realty, which was no more
 than what the law directs in the common case. The
 distinction turned in all the cases on this, whether the
 debts, &c. were merely a charge on the estate devised,

Vide Denn
v. Miller,
infra ch. 13.

or a charge on the devisee himself, in respect of such estate in his hands. Judgment that the devisee took an estate in fee.

Devise charged
with an
annual Pay-
ment for ever.

§ 60. Where lands are devised, with a direction that the devisee shall make a perpetual annual payment thereout, the devisee will take an estate in fee, without any other words: for otherwise he could not fulfil the intention of the testator.

Shailard v.
Baker,
Cro Eliz. 744.

§ 61. *A.* devised lands to *C.* a younger son, and willed that *C.* should pay annually to his eldest son *B.* and his heirs, three pounds. Resolved, that this was an estate in fee.

Webb v.
Hearing,
Cro. Jac. 415.

§ 62. Lands were devised to *J.* and *S.* and they were to pay yearly to the Company of Merchant Taylors in *London* 6*l.* 10*s.* It was resolved, that the devisees took a fee simple, by reason of the annual payment, without any regard to the greatness or smallness of the sum: besides, as the charge continued for ever, the estate must continue so too; for, without the estate the charge could not be.

Smith v.
Tindal,
2 Salk. 685.
11 Mod. 102.

§ 63. A person devised four coats to four boys of the parish of *D.* for ever, and all his lands, tenements, and hereditaments, and all his personal estate to his wife, and her assigns. Adjudged, that the wife had a fee simple, because she took the lands with a perpetual charge.

§ 64. A devise

§ 64. A devise, upon condition of paying an annual sum to a third person, during his life, will give the devisee an estate in fee simple; for, otherwise, the annuity might cease before the death of the person, to whom it was given.

Devise charged with an annual Payment for life.

§ 65. A person devised lands to *A. B.* conditionally that he should allow to his son *Nicholas*, meat, drink, apparel, washing, and lodging, during his natural life.

Lee v. Stephens,
2 Show. 49.

It was argued that this was a fee simple for *Nicholas* had no manner of provision else, but only an allowance of meat and drink. It was plain the testator designed the maintenance to be for *Nicholas's* own life, and not that when *A. B.* should die *Nicholas* should starve, and therefore it was clear that *A. B.* must have a larger estate than for his own life, for otherwise instead of having a benefit by the will, he would be damaged and prejudiced by it, if he should perform the testator's will. It was adjudged by all the court that *A. B.* took an estate in fee simple.

§ 66. *John Thatcher*, being seised of certain houses, devised them to his son *Robert*, upon condition that he should pay unto his two sisters five pounds a year, with a clause of entry for non-payment. The court was of opinion that a legacy or devise is always for the benefit of the party; so that it is reasonable to make such construction of the will, that he may have no possibility of a loss: for, if there be a devise to one upon condition that he pay a sum of money, if there be a possibility of a loss, though not very probable, it

Reed v. Hatton,
2 Mod. 25.

shall be construed a fee. And therefore the estate in this case, being limited to *Robert*, and charged with payments to the sisters during their lives, plainly proved the intent of the testator was, that the devisee should have an estate in fee simple. And judgement was given accordingly.

Goodright
v. Allin,
2 Black R.
1041.

§ 67. A person having a copyhold estate which he had surrendered to the use of his will, after giving several legacies, gave to *Mary Ramsey* the just sum of 20*s.* a year for and during her natural life, to be paid by his executors. He also gave to his kinsman *Thomas Allin* all his two yard lands, with his house and homestead, with the appurtenances; and all the residue and remainder of his goods, chattels, debts, mortgages, leases, and personal estate, he gave to the said *Thomas Allin*, he paying his debts, legacies, and funeral expences, and made the said *Allin* executor.

The question was, whether the devise to *Thomas Allin* was a devise for life or in fee.

Lord Ch. Just. *De Grey* said, he thought the real estate devised to *Allin* was in fee simple, and that upon two grounds. 1st, By implication, not indeed a necessary implication strictly and mathematically speaking; but so far necessary as it clearly arose from the reasonable construction of the will. The annuity was given to *Mary Ramsey* for her natural life to be paid by his executor, which being of an uncertain duration must have an estate in fee to support it. 2d, All the several devises to *Allin* followed each other immediately,

diately, and must therefore be construed as one clause ; so that the payment of debts and legacies was charged on the real as well as the personal estate. The other judges concurred.

§ 68. *Thomas Ives*, being seised of a house, and of two copyhold tenements, and having a daughter and several children, made his will, and devised the house to *Clement Boreham* for his life, paying thereout 40 s. a year to *Robert Boreham*, the testator's grandson, and after *Clement Boreham's* decease, to be equally divided between *R. S.* and *J. Boreham* : and he gave his two copyhold tenements to *Sarah Boreham*, she paying thereout 40 s. a year to her sister *Elizabeth Boreham*.

Baddeley v.
Leppingwell,
2 Burr. 1531.
Wilmot 223.

Mr. Justice *Wilmot* observed, that the construction of this will, like all others, depended on the intention of the testator ; and that, in this case, the intention of the testator was to be collected, first from the devise to *Clement Boreham*, and then from the devise to *Sarah Boreham*. He devises expressly to *Clement*, for and during the term of his natural life, and after his decease to *Robert Sabill* and *Jeremiah Boreham* ; but, in the devise to *Sarah*, he omits the words, " for and during her natural life ; " which it must be supposed he would have inserted, in case he had intended only to give her an estate for life, because he had just before done so in the preceding devise to *Clement*. It was plain that, by giving it her generally, without adding any such restrictive words as he had before added to his devise to *Clement*, he meant to give her the absolute property. He meant to devise it *ut bona et catalla*, as

a man unacquainted with the law might naturally do : and his making no limitation over in this devise to *Sarah* was an additional proof of his intention to give it to her absolutely. But the material circumstance was, the condition he had annexed to her estate, of paying an annuity to her sister *Elizabeth Boreham*. It was objected, that he had expressly directed the 40 s. a year to be paid “*thereout* :” and it was urged, that this was equivalent to making it payable out of the rents and profits. And he thought it was so ; therefore, this was not to be considered as a charge of a payment of a sum of money in gross ; but, by a subsequent clause, he gave 40 l., to wit 20 l. a piece to two other grand-daughters absolutely. Therefore, he probably meant that his grand-daughter *Elizabeth Boreham* should have her 40 s. a year upon the same foot ; and that the provision he had thought proper to make for her, should be a lasting one, to continue during her life, and not that she should be left to starve in case her sister *Sarah* should happen to die before her ; and consequently he must have intended that the annuity, which *Sarah* was to pay to her sister *Elizabeth*, should be an annuity during the life of *Elizabeth* : and, if so, then it followed that this charge of 40 s. a year to *Elizabeth* was just the same thing as devising an annuity to her, though it was put in the form of a condition. And Mr. *Ashurst* very candidly admitted, that, if this was an annuity for life to *Elizabeth*, it would make it a devise in fee to *Sarah* : and, as this could not be effectuated without construing the inheritance to be given to *Sarah*, it raises a very violent presumption,

presumption, that the testator intended her an estate of inheritance.

The judges were all of opinion, that the devisee took an estate in fee.

§ 69. A testator began thus :—“ As touching all
“ such temporal estate,” &c.; and then devised a
house to his grandson, paying yearly and every year
out of the said dwelling-house, the sum of 15 s. to his
grand-daughter.

Goodright v.
Stocker,
5 Term R. 13.

Lord *Kenyon* Chief Justice.—“ Though the general
introductory words used in this will, would have some
effect in the construction of the subsequent devises, as
was said by Lord *Talbot* in a case before him, they
would not of themselves have carried the fee. But it
has been very properly admitted, that the words, “ pay-
“ ing yearly and every year,” are sufficient for that
purpose. That annuity was intended to continue dur-
ing the grand-daughter’s life, though it is not so ex-
pressly mentioned; and, therefore, of necessity, the
grandson must take an estate in fee.”

Ibbetson v.
Beckwith,
ante.

§ 70. The following case was sent out of Chancery,
for the opinion of the Court of King’s Bench : A per-
son devised certain estates to her sister for life; and,
after her decease, she gave the same to *E. Southouse*,
charged and chargeable nevertheless with the payment
of an annuity of 20 l. to *J. T.* for and during the term
of his natural life. The court was of opinion, that
E. Southouse took an estate in fee: and Lord *Kenyon*

Andrew v.
Southouse,
5 Term R.
292.

Infra ch. 13.

observed, that the determination in *Ansley v. Chapman*, Cro. Car. 157, was founded on more limited grounds than on those adopted in modern times.

Exception.—
Where the
Charge is on
the Rents
and Profits.

§ 71. Where lands are devised, with a direction that the devisee shall pay a gross sum of money, or an annual sum, out of the rents and profits of the lands, the devisee will take only an estate for life. The cases on this point will be stated in a subsequent chapter.

Devise to
Trustees for
Purposes re-
quiring a Fee.
Shaw v.
Wright, 1 Ab.
Eq. 176.

§ 72. If lands are devised to trustees, for the purpose of performing any particular trusts, which require that the trustees should have the fee-simple, an estate in fee will pass to them, without any words of limitation: for there is no difference between a devise to a man and his heirs for ever, and a devise to a man, upon trusts which may continue for ever.

Gibson v.
Montfort,
1 Vcl. 485.

§ 73. A person gave all and singular his freehold, leasehold, copyhold, and also his personal estate, of what kind soever, to trustees and their executors, administrators, and assigns, in trust to and for several uses, to pay several annuities, sums, and legacies, by and out of the produce of the personal estate: if that should happen to be deficient, then to pay the same by and out of the rents, issues, and profits, arising by the real estate. One of the questions in this case was, whether the trustees took an estate in fee-simple under this devise? Lord *Hardwicke* was of opinion, that the inheritance was devised to trustees; and said, it had often been determined that, in a devise to trustees, it was not necessary the word "*heirs*" should be inserted,

serted, to carry the fee at law : for, if the purposes of the trust could not be satisfied without having a fee, courts of law would so construe it, as in *Shaw v. Wright*, and in several other cases. Here were purposes to be answered, which by possibility (and that was sufficient) could not be answered, without the trustees having a fee ; viz. the paying of several annuities, and large pecuniary legacies, if the personal estate was deficient, which would probably be the case. Then, how was the rest to be raised ; barely by the rents and profits ? It must be so, if it was a chattel interest : for, then, it could not be taken out of the estate by anticipation ; but that could not be in this case ; for, if the pecuniary legacies were not paid out of the personal, the real must be sold to satisfy them ; for several of them were to be paid within a year after the testator's death, and could not therefore be paid by annual perception. This, then, was a purpose which it was impossible to serve, unless the trustees had the inheritance : for, if they were to sell a fee, they must have a fee.

§ 74. *George Beaumont* devised several sums of 3 *l.* a year, some for life, and some in fee, and added ; “ these legacies to be faithfully paid by my trustee, “ *John Cooke*, every year.” He also left to his trustee and executor 5 *l.* to build a tomb for him, he and his heirs always to see that it was kept in order ; and appointed the said *John Cooke* his sole executor and trustee. The court was of opinion, that all the estate of the testator passed to the trustee in fee ; because the intention was clear, that he meant to devise his real estate

Oates v. Cooke, 3 Bur. 1684.

estate in trust : and there were trusts to be executed, which the trustee could not effectuate, without having an estate in fee devised to him ; for there were annuities in fee charged on the real estate, and the estate must be co-extensive with the charges.

Vide infra
ch. 14.

§ 75. Where only an estate for life is devised in the first instance, and there is a subsequent devise to the heirs of the devisee in fee, he will take an estate in fee.

A general
Devise passes
the whole In-
terest in a
Chattel.

Fenton v.
Foster, Dyer
307 b.

§ 76. In the case of chattels real, a general devise will pass all the estate and interest of the devisor.

§ 77. The termor of a messuage for 40 years, devised and gave the messuage by his will, without any words of limitation. It was resolved, that the entire term passed, for the devisee could not have any estate in the house at will, or for term of life, or for the term of any years, or a year ; therefore, the whole term passed.

Tit. 8. c. 1,
f. 18.

§ 78. A disposition of a term for years to a person and the heirs of his body, is a disposal of the entire interest in the term ; for a term cannot be intailed. But a devise over of a term after a prior disposition of it to a person for life, is good by way of executory devise ; of which, an account will be given in a subsequent chapter.

Infra ch. 19.

1 P. Wm. 666.

§ 79. It is said by Lord Chancellor *Parker*, that a devise of a term to one for a day, or an hour, is a de-

vise

vise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors. But if such an intention does not appear, then it has been held that a limitation of a term to one for life, does not vest the whole so absolutely in him as to be at his disposal, but leaves a possibility (*viz.* upon the death of the devisee within the term) of reverter in the executors of the testator.

Fearne Ex.
Dev. 278.

§ 80. *A.* possessed of a term for 99 years, devised it to *B.* for life, remainder to *C.* for life, and so on to five others successively for life. It was resolved, that after the death of the seven persons to whom the term was devised for life, it should revert to the executors of the testator.

Eyres v.
Faulkland,
1 Salk. 278.

TITLE XXXVIII.

DEVISE.

CHAP. XII.

Construction.—What Words create an Estate Tail.

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| <p>§ 1. Any Words denoting an Intention to give an Estate Tail.</p> <p>5. Heirs qualified by subsequent Words.</p> <p>18. Devise to A. and his heirs with a Remainder over to a collateral Heir.</p> | <p>24. The Words Issue, Children, &c.</p> <p>30. An Estate Tail may arise by Implication.</p> <p>34. A Devise generally may be enlarged into an Estate Tail.</p> <p>42. A Devise for Life may be enlarged into an Estate Tail.</p> |
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Section 1.

Any words denoting an Intention to give an Estate Tail.

1 Inst. 9 b.
1 Vent. 228.

AS lands may be devised in fee without any of those technical words which are required in deeds, so may they be devised in tail. And therefore a devise to a person, *et semini suo*, or to a man and his wife, *et hæredi de corpore et uni hæredi tantum*, gives an estate tail.

Cro. Eliz.
34.

§ 2. It was agreed by the judges of the King's Bench in 36 *Eliz.* that a devise to one and the heir of his body, was an estate tail; and should go to all the heirs of his body: for "heir" was *nomen collectivum*, and one can have but one heir at one time, and this should go from heir to heir.

§ 3. A devise

§ 3. A devise to J. S., and his heirs male, passes only an estate tail; though in a deed these words would create an estate in fee, as the word "*male*" would be rejected.

Baker v. Wall,
1 Ld. Raym.
185.

Tit. 28. c. 24.
f. 20.

§ 4. A person devised a messuage and lands to her eldest daughter *Alice*, and the heirs of her body, lawfully to be begotten, for ever; remainder to her other daughters in the same manner, remainder to her own right heirs for ever, charged and chargeable with the full sum of nine score pounds, to be levied and raised out of the first clear annual and yearly issues and profits of the said messuages &c. and that her executors should stand possessed of the said messuage for so long a time, as until they should raise the said sum; and to and for the benefit of her daughters *Anne*, *Margaret*, and *Judith* (to whom she had given the money) until the same should be paid by her eldest daughter *Alice* or her heirs; and, from and after the raising thereof by *Alice* or her heirs, it was her will that she and her heirs should enjoy the said messuages, &c. for ever. It was resolved that, as the words of the devise created an estate tail, the charge on the lands, and the subsequent use of the words "heirs of *Alice Scofield*," should be construed to refer to the special designation of the heirs, to whom the estate was devised at the beginning of the will; and therefore that *Alice* took only an estate tail. And Lord *Mansfield* observed there never was an instance of an estate in fee raised by implication from the circumstance of a charge being made by the devisor, where

Doev. Fyldes,
Cowp. 833.

Vide *Denn v. Slater*, *infra*. an exprefs estate for life or in tail was given, and here it was an estate tail, with several remainders over.

Heirs qualified by subsequent Words.

§ 5. Although a devise to a man and his heirs gives him an estate in fee simple, yet if the word “*heirs*” is qualified by any subsequent words, which shew the intention of the testator to restrain them to the heirs of the body of the devisee, the devise will, in that case, create only an estate tail.

Clache's Case, *Dyer* 330 *b*.

§ 6. A man devised lands to *A.* his daughter and her heirs; and, if she died without issue in the lifetime of her sister *B.*, that it should remain to *B.* and her heirs. This was held by three justices to be an estate tail: *Dyer* held that *A.* had a fee simple conditional. The opinion of the three judges in this case has, however, been confirmed by several subsequent determinations.

Soulle v. Gerrard, *Cro. Eliz.* 525.

§ 7. *Richard Baker* devised to *Richard*, one of his sons, and his heirs for ever; and, if *Richard* died without issue, or within the age of twenty-one years, then the land should be divided equally amongst his three other sons. Adjudged, that the devisee took an estate tail.

Browne v. Jerves, *Cro. Jac.* 290.

§ 8. *William Browne* being seised in fee, devised all his lands to *John* his son and his heirs; and if he died without issue he devised his lands in *Reculver* to *Mathew* his nephew in fee, and his lands in *Ham* to *Henry* his nephew in fee.

It was resolved that the first limitation to *John* was, as to him and the heirs of his body, and no fee.

§ 9. *William Goldwell* seised of lands in fee, devised them to his wife for life, and after her death to *John* his eldest son and to his heirs, upon condition that he, as soon as the land should come to him in possession, should grant to *Stephen* his second son and his heirs, an annual rent of four pounds out of the said tenements; and that if the said *John* died without heirs of his body, that the land should remain to the said *Stephen* and the heirs of his body. The first question was, whether *John* had an estate in fee by the devise, which was to him and his heirs, upon condition that he should grant a rent to *Stephen* and his heirs, whereby the intent was shewn that he should have a fee, otherwise he could not legally grant such a rent, to have continuance after his death.

Dutton v.
Engram,
Cro. Ja. 427.

But it was resolved to be an estate tail, for being limited, that if he died without issue then it should be to *Stephen* and the heirs of his body, that shewed what heirs of *John* were intended, viz. heirs of his body. But yet by the limitation of the will, he was to make a grant of the rent, which being by appointment of the donor, it was not *contra formam donationis*, but stood with the gift, and should bind the issue in tail.

§ 10. *W. Hydes*, having two sons *Thomas* and *Francis*, devised all his lands to his wife for life; and, after her decease, then he devised his lands in *B.* to *Thomas* his son, and his heirs for ever, and his lands in

Chaddock v.
Cowley,
Cro. Ja. 695.

in *E. L.* to *Francis* his son and his heirs for ever; adding the following words. “*Item*, I will that the
“survivor of them shall be heir to the other, if either
“of them die without issue.”

It was resolved that this was an estate tail, and that although the first part of the will gave a fee, the second part corrected it, and made it but an estate tail.

Brice v.
Smith,
Willes 1.

§ 11. A person gave and devised all his freehold messuage, &c. to his son *P. B.* and his heirs, for ever, on condition that he should pay his son *W. B.* 30*l.* Then followed this clause: “*Item*, my will and mind
“is, that in case any of my said children, unto whom
“I have bequeathed any of my real estates, shall die
“without issue, then I give the estate of him or them
“so dying unto his or their right heirs for ever.”

Lord Chief Justice *Willes* delivered the opinion of the court and said, the question was, whether *P. B.* the devisee took an estate in fee or in tail? And this was divided into two questions: 1st, Whether he would have had an estate tail in case the remainder had been devised over to a stranger? 2d, Whether devising it over to the right heirs of the person so dying without issue made any difference. As to the first question, it could not be doubted, after so many solemn determinations, that if a man devises an estate to *A.* and his heirs, and, afterwards, in his will, gives his estate to another, in case *A.* dies without issue, the subsequent words reduce *A.*’s estate only to an estate tail, and restrain the general word “*heirs*” to signify only heirs
of

of the body. And this is founded upon these known rules, that the intention of the testator shall always take place, in the construction of wills, so far as it can be collected from the will itself, and if it be not contrary to the rules of law : and that the priority or posteriority of words in a will was not at all regarded, but that the whole will must be taken together, to find out the intent of the testator. 2d, But this distinction was relied on, that, though it would have this construction in case the remainder had been devised over to a stranger, it would be otherwise in the present case, because the remainder was devised over to the heirs of the person so dying without issue. But this distinction, though it seemed at first to be of some weight, when considered, made no difference, either in reason or law. Even in grants, where words are construed much stricter than in the case of a will, if there were words that created an estate tail, the grantee would have an estate tail, though the next remainder was limited to his heirs ; and nothing was more common in settlements, than to limit an estate to a man and the heirs of his body, remainder to his right heirs ; and for this plain reason, to prevent his disinheriting his issue, except by some solemn act done in his lifetime. The court was unanimously of opinion, that the devisee took an estate tail.

§ 12. It is observed by Mr. *Durnford*, in a note to this case, that, by the words “ *die without issue*,” the devisor must have meant, dying without heirs of the body, or without heirs generally. But, to suppose that he used those words in the latter sense, would be to

suppose that he intended to devise the lands to his son *P. B.* and his heirs for ever; and, if he die without such heirs, then to the same heirs. There seemed, therefore, less doubt in such a case, respecting the devisor's intention, than in the ordinary case of a limitation over to a stranger, after a dying without issue by the first taker.

Fitzgerald v. Leslie, 3 Bro. Park. Ca. 154.

§ 13. *James Leslie* devised lands to the use of his eldest son *John Leslie* and his heirs for ever; and failing issue of his said son *John*, then to the use of his second son *James* and his heirs for ever; and, failing issue of that son, then to the use of his third son *George* and his heirs for ever; and, failing issue of that son, then to the use of every other son that he should have and their heirs for ever; and, failing issue male, then to his issue female and their heirs for ever; and, for want of issue, then to his heirs for ever. Adjudged by the House of Lords, that, according to the intention of the testator, his sons took successively an estate in tail male; and that, upon the death of the eldest son leaving only a daughter, the second son took in the order of succession.

Denn v. Shenton, Cowp. 410.

§ 14. A will was as follows:—“ I give to my grandson *Samuel Shenton* all my meadow, &c. to hold unto the said *Samuel Shenton* and the heirs of his body lawfully begotten, and their heirs for ever, chargeable with the payment of 8 l a year to my niece, &c.; but, in case the said *Samuel Shenton* shall die without leaving issue of his body, then
“ I give

“ I give the said meadow, &c. unto my nephew
“ *W. G.*”

The question was, whether *Samuel Shenton* took an estate in fee, or an estate tail? It was contended, that the testator meant that the issue of *Samuel* should take an estate in fee; and that the devise over was in the event of *Samuel*'s dying without issue at the time of his death, by which means, it would be an executory devise?

Lord *Mansfield*.—“ The question is, whether the grandson took an estate tail or an estate in fee? Now, the devise is to *Samuel Shenton* and the heirs of his body, and their heirs for ever.” But the words, “ *their heirs for ever,*” are qualified by the subsequent words, “ *in case he shall die without leaving issue,*” which clearly shew it to be an estate tail; and then the testator gives it over to the lessor of the plaintiff. It is too clear to admit of a doubt.”

§ 15. *J. Beech* devised to his wife for life, and, after her decease, “ to be equally divided between his four children, *H., I., E.,* and *S.,* and to each of them and their heirs for ever, share and share alike. And in case they should be minded and agree among themselves to sell the said estate, then every one of his said children should have their equal shares of monies from thence arising: but if they consented and agreed to keep the estate whole together, then, and in such case, all the rents, issues, and profits thereof, from time to time, as they should become

Roe v. Avis,
4 Term R.
60r.

“ due and payable, should be equally paid and divided between his four children, and to the several
 “ and respective heirs of them on their bodies lawfully begotten, share and share alike.”

The Court said, that the children of *J. Beech* took only estates tail in the respective fourths: for, though it was given to them and their heirs, and they had also a power of selling the estates by the former part of the devise, yet the subsequent words, “ to the several and
 “ respective heirs of them on their bodies lawfully begotten,” restrained the operation of the former words, and reduced the estate devised to an estate tail.

Doe v. Rivers,
 7 Term R.
 276.

§ 16. *W. Fildes* by will, after confirming his settlement, by which one part of the estate was settled on his wife for life, devised the rest of the premises to his daughter and only child *Mary*, on her attaining 21, and to her heirs: and as to that part which was settled on his wife, he devised the same to his said daughter after the death of his widow. In case the widow should die before the daughter attained 21, then he willed that both parts of the estate should go immediately to his daughter and her heirs for ever; but he willed that his wife should hold and enjoy both parts until his daughter should attain the age of 21; and, in case his daughter should die without issue, then he empowered her to dispose of the whole by will, or any other instrument in writing; and for want of such issue and direction, &c. then that the same should descend and go to his own right heirs.

The court was of opinion, that the daughter took an estate tail only.

§ 17. A person devised to her son *Richard* and her daughter *Elizabeth*, and their heirs for ever, provided that, if her said son and daughter should both have issue, then both their dividends afore said were to go to the issue of their own bodies; but if but one of them should have issue, then the premises should go to that issue, whether it were the child of her son or daughter afore said; but if they both died without issue of their own bodies, then immediately to the right heir at law and his heirs for ever. The Court was of opinion, that the devisees took estates tail.

Doe v. Whitchelo, 8 Term Rep. 211.

§ 18. It has been stated in the preceding Chapter, that where there is a devise to a person and his heirs, with a remainder over to a stranger, the devise of the remainder is void. But where lands are devised to a person and his heirs, with a remainder over to a collateral heir of the first devisee, the word heirs will be construed to mean heirs of the body; and the first devisee will only take an estate tail; because the limitation over to the collateral heir, plainly denotes that the testator only meant to give the lands to the lineal descendants of the first devisee; for the first devisee could not die without heirs, as long as the collateral heir, or any of his lineal descendants, were existing.

Devise to A. and his Heirs, with a Remainder over to a collateral Heir.

Fearne Ex. Dev. 179.

§ 19. Thus, where a person devised his houses in *London* to *Francis* his son, after the death of his wife, and if his three daughters, or either of them, should

Webb v. Hearing, Cro. Jac. 415

over-live their mother and *Francis* their brother, and his heirs, then they to enjoy the same houses for term of their lives. The principal question was, whether *Francis* the son had a fee, or a fee tail, by the will, in regard the limitation was, if his sisters survived him and his heirs?

The Court resolved he had but a fee tail; for heirs in this place was intended, heirs of his body, for the limitation being to his sisters, it was necessarily to be intended that it was, if he should die without issue of his body, for they were his heirs collateral. And, therefore, there was a difference where a devise was to one and his heirs, and if he died without heirs, that it should remain, it was void as 19 *Hen. 3.* pl. 9. yet, when a devise was to one and his heirs, and if he died without heir it should be to his next brother, there was an apparent intention what heirs he intended; and the intention being collected by the will, the law shall adjudge accordingly.

Tyte v.

Willis,

Forrest R. 1.

§ 20. A testator devised lands to his wife for life, remainder to *Henry* his son for life, remainder to his son *George* and his heirs for ever; and, if he died without heirs, then to his two daughters *Catherine* and *Jane*.

Ante l. 19.

The question was, whether *George* took a fee-simple, or only an estate tail? And the case of *Webb* and *Hearing* was cited to prove, that where a devise is to one and his heirs, and, if he die without issue, remainder over to another, who is, or may be, the devisee's heir at law, such limitation shall be good; and the

the first limitation construed an intail, and not a fee, in order to let in the remainder-man: but, where the second limitation is to a stranger, it is merely void, and the first limitation is a fee-simple.

Lord Chancellor *Talbot*.—In this case, *George* took only an estate tail. The difference, which has been taken, is right: and the reason of it is, that, in the latter case, there is no intent appearing, to make these words carry any other sense than what they import at law; but, in the former, it is impossible that the devisee should die without an heir, while the remainder-man or his issue continue; and, therefore, the generality of the word “*heirs*” shall be restrained to heirs of the body, since the testator could not but know that the devisee could not die without an heir, while the remainder-man, or any of his issue, continued.

§ 21. The rule is the same, where the remainder is limited to the heirs of the testator himself; if such heirs must also be heirs to the first devisee.

*Fearne Ex.
Dev.* 180.

§ 22. A person having issue three sons, *John*, *Francis*, and *William*, devised his land to *Francis* and his heirs, and, for default of the heirs of *Francis*, to the heirs of the devisor.

*Nottingham
v. Jennings,
Com. R.* 81.

Per Holt Chief Justice.—As the devisor says that his own right heirs shall take after the death of *Francis* without heirs, although the devisor's heir takes nothing by this devise, (for he takes by descent), yet this circumstance shews the testator's intention to have

been, that, upon the death of *Francis* without issue, the eldest son should take, and, therefore, the word “*heirs*” must be construed to mean *issue*; because *Francis* could not die without an heir, as long as the testator had an heir.

Morgan v.
Griffiths,
Cowp. 234.

§ 23. *Thomas Griffiths* devised an estate to his grandson for and during his natural life, and, after his decease, to his right and lawful heirs and assigns for ever, and, for want of such lawful heirs, he gave the same to another person, his heirs and assigns for ever.

The Court of King’s Bench certified to the Court of Chancery, upon this case, that the grandson took an estate tail.

The Words
Issue, Chil-
dren, &c.
Wild’s Case,
6 Rep. 16.
1 Vent. 229.

§ 24. If lands are devised to *A.* and his issue, or to *A.* and his children, (*A.* having no children at the time), he will take an estate tail; because it is clearly the intention of the testator, not to give *A.* an estate for life only, but that his children should be benefited by the devise: and they cannot take as immediate devisees, not being *in rerum naturâ*; nor can they take by way of remainder, the devise being immediate.

Anon. And.
43.

§ 25. A person devised to his son *William* for term of his life, and, after his decease, to the men-children of his body; and, if the said *William* died without any man-child of his body, then that the land should remain to another. The Court resolved, that *William* took an estate to him and the heirs male of his body.

§ 26. *A.*

§ 26. *A.* devised to *B.* and if he died, not having a son, then to remain to the heirs of the testator; the word “*son*” was there taken to be used as *nomen collectivum*, and held an estate tail.

Bisfield's Case,
1 Vent. 231.

§ 27. *Edward Wharton* devised all the rest and residue of his estate, as well real as personal, to his nephew *Anthony Wharton*, and his sons, in tail male; and, for want of such issue in tail male, to his brother *John Wharton* and his sons, in tail male; and, on failure of such issue, to his own right heirs. Neither *Anthony* nor *John Wharton* had any issue at the time of making the said will, or at the death of the testator: *Anthony* died without issue. This case was sent out of Chancery for the opinion of the Court of Common Pleas: and the certificate was, that, upon the will and circumstances, *John Wharton* took an estate in tail male in the premises.

Wharton v.
Gresham,
2 Black. Rep.
1083.

§ 28. *Christopher Stephens*, being seised in fee of the lands in question, devised the same in the following manner: “I also give and devise to my son *William Stephens*, when he shall accomplish the full age of 21 years, the fee-simple and inheritance of *Lower Shelton*, to him and his child or children for ever: but, if my son *William Stephens* should happen to die before he should accomplish the full age of 21, then I give and bequeath the fee-simple and inheritance of *Lower Shelton* to my wife *Elizabeth Stephens*, for ever.”

Davie v.
Stephens,
Doug. 321.

Lord Mansfield.—If the testator had used the words, “*all his estate*,” “*inheritance*,” or “*for ever*,” and
had

had stopped there, the fee-simple would have passed ; but the words “ *child or children* ” are to the full as restrictive, as if he had said, “ and if my son die without heirs of his body.” The words of the will give the son an estate tail ; for there were no children born at the time, to take an immediate estate by purchase ; the meaning is the same, as if the expression had been to *William* and his heirs, that is to say, his children or his issue. The words “ for ever ” make no difference ; for *William*’s heirs might last for ever.

Wood v.
Baron, 1 East.
R. 259.

§ 29. The Master of the Rolls directed the following case to be made for the opinion of the Court of King’s Bench. *Thomas Lowe* devised to his daughter *Anne* all his estate and effects real and personal, and added these words : “ Who shall hold and enjoy the same as a place of inheritance to her and her children, or her issue, for ever ; and if it should so happen, that my daughter *Anne* should die leaving no child or children, or if it so happen my daughter *Anne*’s children should die without issue,” then he directed his estates to be sold. The Court certified, that *Anne* took an estate tail.

An Estate
Tail may
arise by Im-
plication.
Newton v.
Bernardine,
Moor 127.

§ 30. An estate tail may arise in a will by mere implication, without any express words of devise ; as where *S. A.* had issue three sons *B.*, *C.*, and *D.* — *B.* died, leaving his wife ensient. *A.* devised to the child, “ my son’s wife now goes with,” 20 *l.* yearly ; and if my son *C.* die before he has any issue of his body, so that my land descend to *D.* before he comes to 21 years, then my executors shall occupy it, till *D.* be 21 years of

of age. It was held, that *C.* took an estate tail by implication, as well by the words, “if he die before he hath issue,” as if it had been “if he die without issue.”

§ 31. *Richard Weeks*, having two sons, *Richard* the elder, and *William* his younger, devised in these words : “It is my will that, if *Richard Weeks* my son shall happen to die, and leave no issue of his body lawfully begotten, that then, in that case, and not otherwise, after the death of the said *Richard* my son, I give and bequeath all my lands of inheritance in *L.* unto the said *William* my son, to have and to hold the same, after the death of the said *Richard*, to him and his heirs.”—Adjudged by Baron *Price*, that *Richard* took an estate tail by implication.

Walter v. Drew, Com. Rep. 372.

§ 32. *John Goodridge* having two sons *Richard* and *John*, devised all his lands to his wife for life, and then proceeded in these words :—“And my will is, that if my son *Richard* do happen to die without heirs, then my son *John* shall enjoy my lands.” The court held that *Richard* took an estate tail by implication.

Goodright v. Goodridge, Willes Rep. 369. 7 Mod. 453.

§ 33. A person having issue a son who was his heir apparent, and two daughters, devised in these words, If it happen my son *B.* and my two daughters to die without issue of their bodies lawfully begotten, then all my lands shall be and remain to my nephew *D.* and his heirs for ever, and died. And it was held, 1st, That no express estate was by this will given to his children. 2d, Nor any estate by implication, because

Gardiner v. Sheldon, 1 Ab. Eq. 197.

cause then it must either be a joint-estate for life, with several inheritances in tail; or several estates tail in succession one after another. The last it could not be, because uncertain which should take first, which next, and the first it should not be, because the heir at law is not to be disinherited without a necessary implication, which in this case there was not, for it was only a designation or appointment of the time when the land should come to the nephew.

A Devise generally may be enlarged into an Estate Tail.

§ 34. A devise to a person generally, without any words of limitation, which of itself would create only an estate for life, may be enlarged by subsequent words, or by implication, into an estate tail.

Chapman's Case, Dyer 333.

§ 35. A house was devised to three brothers, among them; provided always that the house be not sold, but go to the next of the name and blood. Resolved, that the devisees took estates tail.

King v. Rumball, Cro. Jac. 448.

§ 36. A person devised to his three daughters to be equally divided; and, if any of them died before the other, then the one to be the other's heir, equally to be divided; and, if his three daughters died without issue, then he willed it to two strangers. Adjudged, that the daughters took estates tail.

Robinson v. Miller, 1 Roll. Ab. 837.

§ 37. A person devised land to his wife for life, and after to his son, and if his son died without issue having no son, that another should have it. Adjudged, that the son took an estate in tail male.

§ 38. *Robert*

§ 38. *Robert Johnson* being seised in fee of a copyhold of inheritance, which he had surrendered to the use of his will, devised to *J. Wedgeborough* his house in the *Brook* and 30 l., and then gave other pecuniary legacies; to *William Taylor*, his sister's son, a house by the description of his "*house on the green with the ground and out houses thereto belonging*," and declared his will and meaning to be, that if either of the persons, before named, died without issue lawfully begotten, then the said legacy should be divided equally between them that were left alive. Adjudged that *William Taylor* took an estate tail.

Hope ex dem.
Brown v.
Taylor,
1 Burr. 268.

§ 39. A man having issue two sons, devised all his land to his eldest son, and, if he died without heirs male, then to his other son in like manner. The court said it was plain that the word "*body*," which properly created an estate tail, was left out; but the intent of the testator might be collected out of his will, that he designed an estate tail; for, without this devise, it would have gone to his second son, if the first had died without issue. It was, therefore, an estate tail.

Blaxton v.
Stone,
3 Mod. R.
133.

§ 40. A person devised to the three sons of *C. D.* successively in tail male; remainder to every son and sons of the said *C. D.*, which should be begotten on the body of *Sarah* his wife. And for want of such issue to *W. H. &c.* with a proviso, that the devisees and their descendants should take the surname and arms of the testator. The Court of King's Bench resolved, that the afterborn sons took several estates in tail male, in succession; as the words, "*for want of*
"*such*

Evans v.
Astley,
3 Bur. 1570.

“*such issue*,” must be construed ‘for want of heirs male of the body,’ and that this was the true construction.

Denn v.
Slater,
5 Term R.
335.

§ 41. A person devised in these words: “I give and bequeath all my copyhold lands to my nephew *Isaac Slater*; but, if the aforesaid *Isaac Slater* shall die without male heir, then my will is, that my nephew *John Slater* shall enter upon and enjoy the said copyhold lands, his heirs or assigns for ever. Provided the aforesaid *Isaac Slater* paid to his wife *Elizabeth Slater* the sum of 8*l.* a year during her life, with a power of entry to the wife if the annuity was not paid. It was contended that *Isaac* took a fee by reason of the annuity. Lord *Kenyon* said, it was clear from all the cases on the subject, that *Isaac Slater* took an estate tail. He cited the case of *Blaxton v. Stone*, and *Burley’s* case, 43 *Eliz.* cited by Lord *Hale*, 1 *Vent.* 230. “A devise to *A.* for life, remainder to the next heir male; for default of such heir male, then to remain. “Adjudged an estate tail.” And, with regard to the other question, the law was very accurately stated by Lord *Mansfield* in the case in *Cowper*; where an estate was given generally, without adding words which would create a fee or an estate tail, and it was charged with the payment of annuities, the devisee took a fee; but that was not the case, where an estate tail was given to the devisee.

Ante.

Doe v. Fyldes,
Ante s. 4.

A Devise for
Life may be
enlarged into
an Estate
Tail.

§ 42. An express devise to a person for life, may be enlarged by subsequent words, or by a necessary implication into an estate tail. For where an estate is

devised to a person for life, with a limitation over, which is not to take effect while there is any issue of the devisee for life, if there are no words in the will under which the issue can take as purchasers; as they cannot take by implication, the courts, in order to carry the manifest general intent of the testator into effect, have disregarded the particular intent, and by enlarging the estate devised for life, into an estate tail, have let in all the issue of the first devisee.

§ 43. Lands were devised to *A.* for life, without waste, with a power for him to make a jointure, remainder to his first, second, and so to his sixth son, and no farther; after which followed these words: "If *A.* should die without issue male of his body, then to *B.* in fee." This case having been sent out of Chancery to the Court of Common Pleas, by Lord *Trevor*, it was resolved there, that there being no limitation beyond the sixth son, and for that there might be a seventh, who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take (but still to take as issue and heirs of the body of *A.* in tail by descent, and not by purchase) the court held the words; "In case *A.* should die without issue male of his body," did, in a will, make an estate tail.

Langley v. Baldwin,
1 P. Wms.
759.
8 Mod. 258.
Fitzg. R. 13.

§ 44. *John Sutton* being seised in fee of the *Chequer Inn* in *Holborn*, devised it to his nephew *Thomas Sutton* for and during the term of his natural life, and after his death to the first son or issue male of his body lawfully begotten, and to the heirs male of the body of such first son, and for default of such issue, to the second

Att. General
v. Sutton,
1 P. Wms.
753.
3 Bro. Parl.
Ca. 75.

second son or issue male of the body of the said *Thomas Sutton* lawfully to be begotten and to the heirs male of such second son, lawfully to be begotten, for ever, and from and immediately after the death of the testator's wife and of his said nephew *Thomas Sutton* without issue male of his body, or after the death of such issue male, he devised all the said premises to trustees for charitable purposes.

It was held that *Thomas Sutton* took an estate tail by implication, the remainder being limited after his death without issue male.

Sparrow v. Shaw,
3 Bro. Parl.
Ca. 120.

§ 45. *T. R.* devised an estate to trustees, and the survivor of them, in trust for his sisters *Ann* and *Dorothy* equally betwixt them during their natural lives, without committing any manner of waste; and and if either of my sisters happen to die, leaving issue or issues of her or their bodies lawfully begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues, and if it should happen that both his said sisters died without issue as aforesaid, and their issue or issues died without issue or issues lawfully to be begotten, then the trustees to stand and be intrusted for the testator's kinsman. The Court of Great Sessions for the county of *Flint* determined that *Dorothy* having survived her sister *Ann*, was tenant in tail of one moiety, under the devise, and of the other moiety as a remainder upon the death of her sister without issue. Upon a writ of error in the Court of King's Bench this judgment was reversed. A writ of

error was then brought in the House of Lords, and all the judges having delivered their opinions *seriatim* on this case, the judgement of the Court of King's Bench was reversed, and that given in the Court of Great Sessions was affirmed.

§ 46. A person devised his estate to trustees in trust to convey and assign the same to his son, his heirs, executors, and assigns, when he attained the age of twenty-three years, subject to such settlement as after mentioned. And if he married a gentlewoman, the trustees to settle a jointure on her, and subject thereto, on the issue of the marriage in strict settlement, as counsel should advise. But if he died without issue of his body, he gave his real estate to his nephew *C. Cowper*. Upon a bill to carry the trusts of this will into execution, Lord *Hardwicke* directed that there should be an intermediate remainder in tail limited to the son; as the words, "If he die without issue," were sufficient to enlarge or give an estate tail by implication.

Allanfon v. Clitherow,
1 Ves. 24.

§ 47. *George Robinson* devised a real estate to *Launcelot Hicks*, for and during the term of his natural life, and no longer, provided he altered his name and took that of *Robinson*, and lived at his house at *Bochym*, and after his decease to such son as he should have lawfully to be begotten, taking the name of *Robinson*; and for default of such issue, then he bequeathed the same to his cousin *W. R.* and his heirs for ever.

Robinson v. Hicks, 3 Bro. Parl. Ca. 180.
1 Burr. 38.
2 Ves. 225.

Upon a bill to establish this will, and to carry the trusts of it into execution, Sir *Joseph Jekyll* declared, that *Launcelot Hicks* alias *Robinson* was entitled to an estate for life, with remainder to the eldest and but one son of the said *Launcelot Robinson* for life, they performing the conditions of the will, and that the remainder would go over to *W. R.* On an appeal from this decree Lord *Talbot* affirmed it, as to the interest which *Launcelot Hicks* took in the testator's estate under his will, by a declaration in the very words of the former decree. *Launcelot Hicks* had two sons, *George* who died an infant, and *Edmund*, who filed another bill against *W. R.* the devisee in remainder, and the trustees, for an execution of the trusts of the will. Lord *Hardwicke* ordered, that a case should be made for the opinion of the Judges of the Court of King's Bench, upon the following question: "Whether any and what estate or interest in the premises in question did by virtue of the said will vest in the said *Edmund*?" The Judges of the Court of King's Bench certified, "That they were of opinion that upon the true construction of the will of the testator *George Robinson*, *Launcelot Hicks* therein named, must, by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail male; he and the heirs male of his body taking the name of *Robinson*, notwithstanding the express estate devised to the said *Launcelot Hicks* for his life, and no longer."

The cause coming on to be heard on this certificate before the Lords Commissioners, their Lordships
declared

declared that *Edmund Hicks* otherwise *Robinson*, as son of *Launcelot Hicks*, was entitled to an estate in tail male in the premises. From this decree an appeal was brought in the House of Lords, and the Judges were directed to give their opinions upon the following question, *viz.* “Whether any and what estate or interest in the premises in question was, by virtue of the will of the testator *George Robinson*, vested in *Edmund Hicks* alias *Robinson*, the respondent.” And, after taking time to consider, the Lord Chief Baron delivered the following unanimous opinion, *viz.* “That, by the will of the testator *George Robinson*, an estate in tail male did vest in *Launcelot Hicks* alias *Robinson*, the father, and that an estate tail was vested in *Edmund Hicks* alias *Robinson*, the son, as heir male of the body of *Launcelot Hicks* alias *Robinson*.” Whereupon it was ordered and adjudged, that the appeal should be dismissed, and the decree therein complained of affirmed.

§ 48. *Joshua Brown* devised lands to his nephew *William Brown* and his assigns, for and during the term of his natural life; and from and after the death of the said *William Brown*, then to the first son of the body of the said *William Brown*, and to the heirs male of the body of such first son, and for want of such issue then to the second, third, fourth, fifth, and every other son and sons of the said *William Brown* according to their seniority, and to the heirs male of the body of such second, third, fourth, fifth, and other sons of the said *William Brown*; and for want of such issue of the body of the said *William Brown*, then to

Chapman v. Brown,
3 Burr. 1626
3 Bro. Parl.
Ca. 269.
Cases and
Opins. vol. 2.
417.

the second son of his brother *Reginald Brown*, for and during the term of his natural life; and from and after the death of the said second son of his brother *Reginald Brown*, then to the first son of the body of such second son of his said brother *Reginald Brown*, and to the heirs male of the body of such second son, and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of his said brother *Reginald Brown*, according to their seniority, and to the heirs males of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *Reginald Brown*; and for want of such issue then to the eldest or next son or sons of the said *Reginald Brown* for the time being, for the term of his natural life, and after his or their deaths, to the heirs males of the bodies of such eldest or next son of his said brother *Reginald Brown*, with remainder to the sons of his brother *Samuel*. The testator died leaving *Thomas*, *Reginald*, and *Samuel*, his brothers, and *William* his nephew the son of *Reginald*; after the death of the testator *Reginald* had issue a second son, named *Thomas*; and the question was, whether *Thomas* took any and what estate under this will. The Court of King's Bench was of opinion, that *Thomas Brown* took an estate tail. A writ of error was brought in the House of Lords and the following question was put to the Judges—"Whether *Thomas* the second son of *Reginald Brown* took any and what estate under the will of *Joshua Brown*?" Whereupon the Lord Ch. Baron delivered their unanimous opinion—"That *Thomas* the second son of *Reginald Brown* took an estate tail under the will of

" *Joshua*

“ *Joshua Brown.*” Whereupon the Judgement of the Court of King’s Bench was affirmed.

§ 49. *A. Dymock* devised to his nephew *William* all his freehold estate at *A.* to hold to him during his natural life, and after his decease, to and amongst his issue; and in default of issue, to be divided between his nephew *E.* and his niece *M.* and to their heirs and assigns for ever.

Doe v.
Applin,
4 Term R. 32.

Lord *Kenyon*.—“ Although this will is very inaccurately drawn, I think we may collect the devisor’s general intention from the words of it; the great question in this case is, what estate *W. Dymock* took under the will. In the first clause the estate is expressed to be given only during his natural life, but in the next limitation it is to go to *his issue*, and in default of issue only, it was to go over; it is clear therefore from the whole of the will, that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in *W. Dymock*. Now I think we are warranted by many determinations, and particularly by that of *Robinson v. Robinson*, to give that effect to the will which will best answer the devisor’s general intention; though, by so doing, we may defeat some particular intent. Here the general intent was, that *W. Dymock* and his issue should take first; then what construction will best effectuate that intention. It has been argued by the plaintiff’s counsel, that *W. Dymock* took only an estate for life, and his children an estate tail: but it would be difficult to

Ante f. 39.

“ put two different interpretations on the word *issue* ;
 “ and, even if that could be done, it would not fur-
 “ ther the intention of the devisor in this case ; for
 “ there are no cross remainders to the children, and
 “ they never can be implied ; so that, according to
 “ the construction contended for, if one of the chil-
 “ dren died, his share would go over to those in
 “ remainder, in prejudice of those children who sur-
 “ vived, which was certainly not intended by the
 “ devisor. Therefore we shall best answer his general
 “ intent by saying, that *W. Dymock* took an *estate*
 “ *tail* ; and, in so determining, we shall not go farther
 “ than has been done in other cases.” Judgement
 was given that *W. Dymock* took an estate tail.

Denn v.
 Puckey,
 5 Term R.
 299.

Doe v Smith,
 7 Term R.
 531.

§ 50. A person devised all his freehold messuages, &c. to his daughter *Mary Ayfcough* and the heirs of her body, lawfully to be begotten, for ever ; as tenant in common, and not as joint-tenants ; and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then he gave his freehold messuages to *R. Ayfcough* in fee.

Antef 47.

Lord *Kenyon* said, it was a rule of construction in cases of this kind, settled by a variety of decisions, but particularly by that of *Robinson v. Hicks*, that where it appeared in a will, that the testator had a general intention, and also a secondary intention, and they clashed, the latter must give way to the former. Here were no words of limitation added to the estate given to the children, (supposing they took as purchasers)

chasers) and yet the remainder over was not to take effect till there was a general failure of her issue; so that there must be an estate to comprehend all her children for ever; his Lordship concluded in these words—"I admit that in this case the testator intended, that his daughter *M. Ayscough* should only take an estate for her life, and that her children should take as purchasers: but then he also intended that all the progeny of those children should take before any interest should vest in his more remote relations: now the latter intention cannot be carried into effect, unless *M. Ayscough* takes an estate tail; in order therefore to give effect to the deviser's general intention, according to the fair construction of the will, *M. Ayscough* must take an estate tail."

§ 51. *Henry Cook* devised a messuage or tenement to *Richard Cook* for the term only of his natural life, and after his decease, he gave and devised the same unto the lawful issue of the said *Richard Cook*, as tenants in common, to whom he gave, devised, and bequeathed the same; but in case the said *Richard Cook* should die without leaving lawful issue, then and in such case, after his decease, he gave and devised the same to *Elizabeth Harding* in fee.

Doe v. Cooper,
1 East. R.
229.

Lord *Kenyon* said, it had been the settled doctrine of *Westminster Hall*, for the preceding forty or fifty years, that there might be a general and a particular intent in a will, and that the latter must give way, when the former could not otherwise be carried into effect. That this doctrine had been confirmed by the cases of

Robinson v. Hicks, *Roe v. Grew*, and *Doe v. Smith*, that perhaps the court would best fulfil the particular intent of the testator in this case, by giving *Richard Cook* only an estate for life; but the general intent was that all issue should inherit the entire estate, before it went over; and that intent could only be answered by giving him an estate tail, by implication from the subsequent words, "In default of his leaving issue."

Vide infra,
ch. 14.

§ 52. Where only an estate for life is devised in the first instance, and there is a subsequent devise to the heirs of the body of the devisee, he will take an estate in tail.

TITLE XXXVIII.

DEVISE.

CHAP. XIII.

Construction.—What Words create an Estate for Life.

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| <p>§ 1. <i>Where an express Estate for Life is devised.</i></p> <p>6. <i>Though a Power of Disposal is given.</i></p> <p>10. <i>A Devise without any Words of Limitation.</i></p> <p>26. <i>Though charged with a Payment out of the Estate devised.</i></p> | <p>§ 33. <i>Or an Annuity during the Life of the Devisee.</i></p> <p>35. <i>The Word Estate, when descriptive of Local Situation.</i></p> <p>38. <i>The Word Hereditaments only passes an Estate for Life.</i></p> |
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Section I.

IT has been stated in the preceding chapter, that although an express estate for life be devised, yet if the general intent of the testator requires that the issue of the devisee for life should take by descent from him, the courts have enlarged his estate into an estate tail; but where the manifest general intent of the testator does not require that the estate for life expressly given should be enlarged into an estate tail, the devisee will only take an estate for life, in consequence of the rule that, *expressum facit cessare tacitum*. And it is observable, that the doctrine of carrying the general intent into effect, in contradiction to the particular intent, is of very modern date.

Where an express Estate for Life is devised.

1 Roll Ab.
837. pl. 13.

§ 2. A person devised to his eldest son for life, remainder to the sons of his body lawfully begotten, and, if they aliened, that his daughters should have the same estate, remainder to his right heirs; it was resolved, that the eldest son had but an estate for life, and that his son should have it by purchase; because it was expressly limited, that he should have it only for life.

2 Vent. 231.

Lord *Hale* says, that the words, in this case, were to his eldest son for life, *et non aliter*; and that it was held to be an estate for life, by reason of the words *non aliter*.

Bamfield v.
Popham,
1 P. Wm. 54.

§ 3. A person devised his estate to trustees and their heirs, to the use of them and their heirs, in trust for *Popham* for life, with remainder to his first and other sons successively in tail male, and, for want of issue male of *Popham*, remainder over. Afterwards the testator, by a codicil, reciting that he had by his will given the premises to *Popham* and the heirs male of his body, willed, that if the estate should determine, and *Popham* should die without issue male, then his estate to be disposed of in such a manner, &c.

The questions were, 1st, Whether the words of the will, *viz.* "for want of issue male of *Popham*," did not by implication give an estate tail to *Popham*? 2d, Whether, (admitting the words in the will did not give an estate tail), the codicil, reciting that the testator had by his will devised the premises to *Popham* and the heirs male of his body, would not so far influence
and

and explain the will, as to make it an estate tail, though it was not so before?

It was resolved unanimously, that *Popham* had only an estate for life by the will, and that the same was not enlarged or altered by the codicil: for they all resolved that, here being an express estate given to *Popham* for life, with remainder to his first and every other son, &c. the words, “if *Popham* should die without issue male,” should not enlarge his estate to an estate tail, in regard these amounted only to make an estate tail by implication; and words of implication could never destroy what was before expressed; so that the words, “if he should die without issue male,” could mean no more than if he should die without sons.

§ 4. A testator devised all his freehold estates to trustees, in trust to convey the same to *Ewer Edgeley* for life, remainder to trustees during his life, to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his daughters in tail general, as tenants in common, with power to the said *E. E.* to make a jointure; and if *E. E.* should die without issue, then he devised the premises over.

Blackburn v.
Edgeley,
1 P. Wm. 600.

It was contended, that *E. Edgeley*, by virtue of the words, “if he die without issue of his body,” should have an estate tail in the premises; to which, it was answered, that here was an express estate for life limited to *E. Edgeley*; and the words, “if he should die without issue,” being only words of implication,

tion, would not merge and destroy an express estate for life.

Ante.

The court exploded the notion, that words of implication should not turn an express estate for life into an estate tail ; and said, that if *Y.* devise an estate to *A.* for life, and after his death without issue, then to *B.*, this will give an estate tail to *A.* according to *Sunday's* case : but, here being a limitation upon *E. Edgeley's* death to his sons, and after to his daughters, the following words, “ *if E. Edgeley should die without issue,*” must be intended, if he should die without such issue. And as to what had been urged, that unless these words were to create an estate tail in *E. Edgeley*, his son's daughters could not take ; it did not appear that the testator intended *E. Edgeley's* son's daughters should take, for he might think that, on *E. Edgeley's* dying without issue male, his name and family would be determined ; for which reason, he might limit it over to the daughters of *E. Edgeley* himself. Besides, the son of *E. Edgeley* would be tenant in tail ; and when of age, might, by docking the intail, give the premises to his daughters.

Goodtitle v.
Wadhold,
cited 1 Bur.
45.

§ 5. A person devised to his eldest son, only for life, and in the case of failure of issue, &c. that it should descend and come to his the testator's male children, &c. The Court of Common Pleas held this to be an estate for life only ; because, being expressed to be given for life only, with negative words, it could not be enlarged by implication.

§ 6. Although a devise to a person generally, with a power to give and dispose of the estate devised, as he pleases, creates an estate in fee-simple, yet, where an estate is devised to a person expressly for life, with a power of disposal, the devisee only takes an estate for life, with a naked power to give the reversion.

Though a
Power of Dis-
posal is given.
Ch. 11.

§ 7. A testator having two daughters, devised lands to his wife for life, and, at her decease, she to give the same to whom she pleased. The wife granted the reversion to a stranger, and committed waste, and the two daughters brought an action of waste. It was held, that by the devise, the wife had but an estate for life, with an authority to give the reversion to whom she pleased; and her grantee would be in by the will, for the testator had given his wife an express estate for life, and therefore she could not, by implication, have any greater estate: but if an express estate had not been appointed to the wife, by the other words, an estate in fee-simple had passed.

Anon. 3 Leon.
71. 4 Leon.
41.

§ 8. *John Tomlinson* devised lands to his wife for her life, and then to be at her disposal, provided it was to any of his children, if living; if not, to any of his kindred that his wife should please. It was resolved, that the wife had but an estate for life, with a power of disposing of the inheritance. And Lord Chief Justice *Parker* said,—“As to this, the difference is
“where a power is given with a particular description
“and limitation of the estate, as here; and where
“generally as to executors to give or sell; for, in
“the former case, the estate limited being express and
“certain,

Tomlinson v.
Dighton,
1 P. Wm. 149.

“ certain, the power is a distinct gift, and comes in
 “ by way of addition ; but, in the latter, the whole is
 “ general and indefinite ; and as the persons intrusted
 “ are to convey a fee, they must, consequently, and
 “ by a necessary construction, be supposed to have a
 “ fee themselves.”

Hockley v.
 Mawbey,
 1 Ves Jun.
 143.

§ 9. *John Russell*, by will, gave a legacy of 1000 *l.* to his son *Richard Russell*; and an estate in fee to a nephew, and then directed his executrix to lay out 2000 *l.* of his personal property in the purchase of freehold estates, within twelve months after his death. Those estates, to be purchased, four messuages in *John-son's Court, Fleet Street*, some others in *Bermondsey*, and the reversion of others elsewhere, (describing them all), and all his leasehold estates, he gave to his wife *Rebecca Russell* for life ; and, from and immediately after her decease, to his son *Richard Russell* and his issue lawfully begotten, or to be begotten, to be divided among them as he should think fit : and, in case he should die without issue, he directed that all, as well his *present* freehold and leasehold, as the estates directed to be purchased, should be sold ; and the money, arising from the sale, should be divided among the children of his brother *Russell*, and of his sisters *Willis* and *Parks*, equally, share and share alike. There was a subsequent direction, that no part either of his *present* freehold and leasehold, or of the estate so directed to be purchased, should be sold during the lives of his wife and son. All the rest, residue, and remainder of his property and effects, whatsoever and wheresoever, after payment of debts, legacies, and funeral expences,

he gave to his wife for her own use and benefit, for ever, and appointed her his sole executrix. The wife enjoyed under the will for her life; and, after her death, the son enjoyed for his life, and died without leaving issue. The will was established by a decree.

One of the questions in this case was, Whether *Richard Russell* the son took an estate tail, or for life only, under this will?

Lord *Thurlow* said it was clear to him, that the testator intended, and, he thought, had pretty plainly expressed, a contingency with a double aspect; in one case, to the children of the son, in the other, to the other persons pointed out; to the children of the son in one way, to the other parties in another, viz. by settling it so as to distribute it among the great number of persons who might come within that description. The limitation to the son and his issue would be an estate tail, and, perhaps, the aptest way of describing an estate tail according to the statute: but it was clear he did not intend it to go to them as heirs in tail: for he meant they should take distributively, and according to proportions to be fixed by the son. It had often been decided in other cases beside those mentioned at the Bar, that, where there was a gift in that way, the parties must take as purchasers: for there was no other way for them to take. The immediate consequence of this was, that *Richard Russell* could only take for life; and the consequence of that was, that this was a gift to the wife for life, then to the son for life; and after, to his issue, in such distributive shares as he should appoint.

point. It was then said, that this might be interpreted to be a gift to the son in tail, with a power annexed to raise a future use upon it, of the description mentioned. As to that, he apprehended, that, in case there had been children of the son, it was not intended to be left in his power to determine, whether he should or should not consider it as his own, and raise a future use if he pleased : but the disposition gave an interest to his children, and a title to insist upon an estate in the premises so given at all events : and then the son had no authority but as to the proportions in which they were to take ; but not to choose whether any thing should be given to them or not. Then the effect was like all other gifts to persons in remainder, capable of being divided ; but if not, equally : and that was the necessary consequence of the supposition he mentioned before, that he intended to vest an interest in the children of his son independently of the son, except as to the proportions ; and that even so, as that they should not be illusory. It was observed, that the word “ *issue* ” would extend to grandchildren, or any other degree of kindred, however remote. He thought it would be so, but only in this point of view ; as a description of the objects, among whom the power of the son was to obtain, to make such partition as he should think fit ; and, whosoever they were, they must be in existence during the life of the son, and he must have made it during his life ; if so, it was of no consequence how they were described ; for, if it vested in him, it was of no consequence to say they were not the immediate descendants of the son. It was an estate, devised upon two alternative contingencies ; one, that there were objects capable of taking under the first limitation ; another, that there were

were none such, but that there were objects capable of taking under the second. As to its being an estate tail by implication, it was contrary to reason and to common sense to impute that intention to him, if only arising from his not having made a special devise of the estate in that form. The estate he was directing to be sold, and the estate supposed to be given to the son in tail, were the same; and if so given, it could not be sold by this power, and did not come within the range of what he had before directed. It was plain, therefore, he did not intend an estate tail; and he was himself clear upon that point.

§ 10. Where no words of limitation are added to a devise, and there are no other words from which an intention to give an estate of inheritance can be collected, the devisee will only take an estate for life.

A Devise
without any
Words of
Limitation.

§ 11. If a man devise in this manner—I devise *Blackacre* to my daughter *F.* and the heirs of her body begotten. *Item*, I devise unto my said daughter *Whiteacre*. The daughter shall have but an estate for life in *Whiteacre*: for the word *Item* is not so much as, in the same manner.

1 Roll. Ab.
844.
1 Roll. Rep.
369.
1 Mod. 100.

§ 12. But if a person devise *Blackacre* to one in tail, and also *Whiteacre*, the devisee shall have an estate tail in *Whiteacre* also, for this is all one sentence, and so the words which make the limitation of the estate go to both.

Idem.

1 Roll. Rep.
369.
3 Bullstrode
127.

§ 13. A person made his will in these words—"I devise to my eldest son and his heirs *Blackacre* for his part. *Item*, I devise to my second son *Whiteacre* for his part." Adjudged that the second son took a fee, because the words have a reference to the part of the eldest son.

Pettywood
v. Cook,
Cro. Eliz. 52.
2 Leon. 129.

§ 14. One *Hawkins* being seised in fee of three houses devised them to his wife for life, the remainder of one to *Robert* his son and his heirs, the remainder of another to *Christian* his daughter and her heirs; and of the third to *Joan* his daughter and her heirs; and did further will that if any of them died without issue, then the survivors should enjoy, *totam illam partem*, equally divided between them. It was resolved that the survivor only took an estate for life.

Spirt v.
Bence,
Cro. Car 368.
Vaugh. 262.

§ 15. A person having three sons *B. C. and D.* devised lands to *B* in tail, remainder to *C.* in fee: and other lands to *C.* in tail, remainder to *D.* in tail; and then other lands to *D.* in fee. He afterwards said—*Item*, I give *Blackacre* to my said son *D.* *Item*, I give to my said son *D. Whiteacre*; also I will that all bargains, grants, &c. which I have from *J. S.* my son *D.* shall enjoy and his heirs for ever; and for lack of heirs of his body, to my son *C.* for ever. Agreed by all that the bargains and grants, &c. only were intailed. And that *D.* had but an estate for life in *Blackacre* and *Whiteacre*.

Woodward v.
Glasbrook,
3 Vern. 388.

§ 16. A person devised a house to his sons *James* and *Thomas*, and the heirs of their bodies, in equal moieties.

moieties, and then added, "But my will and mind is, " that if any of my said children shall die before " twenty-one, or unmarried, the part or share of him " or her so dying, shall go over to the survivors." Lord Ch. Just. *Holt* was of opinion that *Thomas* dying unmarried, his moiety went over to the survivor; and that by the devise over, only an estate for life passed.

§ 17. In the case of *Cook v. Cook*, which has been Ante ch. 10. stated in a former chapter, Lord *Cowper* held that the issue of J. S. only took an estate for life.

§ 18. A person devised a copyhold estate to his daughter *Jane*, her heirs and assigns for ever; but in case his said daughter died before she attained the age of twenty-one years, and had no issue, then his will was, that his nephew *John Hardisty* should have his said copyhold lands and tenements. The court was clearly of opinion that *John Hardisty* took only an estate for life. That the testator, by his devise to *Jane*, plainly understood the force of words of limitation, and if he had intended to give his nephew more than an estate for life, he knew how to have done it. That there were no express words in the will that gave the nephew a fee, nor any manifest intention to do so, or to disinherit the heir at law. Roe v. Holms,
2 Will. Rep.
80.

§ 19. A will began with these words—As touching the disposition of such temporal estate as it has pleased God to bestow on me. And then the testator proceeded to give his house to his son *Samuel Ruffel*, and after his death, then to the sons of *Samuel, Thomas* Right v.
Ruffel, cited
Doug. 761.

and *William*; and gave a legacy of one shilling to the husband of his heir at law. It was adjudged that *Thomas* and *William* took only an estate for life.

Roe v.
Blackett,
Cowp. 235.

§ 20. *C. B.* being seised and possessed of freehold and leasehold property, lying contiguous, and demised together, made his will and devised to his wife all his freehold and leasehold messuages, &c. and all his estate and interest therein, for and during her natural life, and after her decease, he devised the said messuages to his sisters in law *M. S.* and *M. B.* as tenants in common; but in case his mother should give any disturbance to his wife, then his will was, that the same should go to his kinsman *W. B.* his heirs and assigns for ever; and charged his estate with the payment of all his just debts, to be paid out of the yearly rents of his estates by his said wife. Lord *Mansfield* said, there were no words of limitation added to this devise, and therefore it was clear by the rule of law, that it was only an estate for life, unless it could be found from the whole of the will taken together, and applied to the subject matter of this devise, that the testator's intention was to give a fee. Judgment that the sisters-in-law only took an estate for life.

Roe v. Bolton,
2 Black. R.
1045.
Doug. 761.

§ 21. A person devised all his real and personal estate to his wife, for her natural life, and at or immediately after her decease, he gave to his son *Paul*, all that his land lying and being in *Dudley*, and gave to each of his grand children (one of whom was his heir at law) a legacy of five shillings. The court was of opinion that *Paul* only took an estate for life.

§ 22. *John*

§ 22. *John Gaskin* began his will thus, as to all such wordly estate as God has endued me with—he then gave all that his freehold messuage and tenement lying in *Gaitsgill*, &c. to his three nephews, equally to them; and gave 10*s.* to his heir at law.

Denn v.
Gaskin,
Cowp. 657.

Lord *Mansfield* said, it was settled in devises, as well as in deeds, that if no words of limitation are added, the devisee can only take an estate for life, because the law implies a life estate only, where there are no words of limitation: But as there are no technical words necessary in a will, if the testator makes use of what is tantamount, as if he says, I give to such a one in fee simple, or, all my estate, that will carry all his interest in the land devised. But there must be words in the will to controul the rule of law, which his Lordship believed in a variety of cases thwarted the intention of the testator. He suspected extremely that in this very case, the testator meant to give his nephews a fee in the premises in question; for he had no other landed property. He made them residuary legatees of his personalty, and gave a disinheriting legacy to his heir at law, agreeable to the vulgar notion taken from the *Roman* law, that an heir is cut off with a shilling. But the single question was, whether the court could find any words in the will to take this case out of the rule of law, if they could not, it must be adhered to. His Lordship said, it was impossible to find words in this will sufficient to controul the rule of law. There were no words that could connect the devise of the lands in question, with the introduction, so as to pass the

whole interest, therefore the devisees could only take an estate for life.

Right v.
Sidebotham,
Dong. 759.

§ 23. *William Sparrowhawk* devised as follows:—
“ For those worldly goods and estates wherewith it hath pleased Almighty God to bless me, I give and dispose of the same in manner following,”—then gave one shilling to his heir at law; and, after giving other legacies, came this clause—“ And I do give and *demise* “ unto *Susanna Sparrowhawk* my said wife, her heirs, “ and assigns for ever, all my lands lying in the parish “ of, &c. And I give and bequeath to my loving wife “ afore said, all my lands, tenements, and houses, lying “ in the parish of *Chipping-norton*.” The question was, whether the last mentioned premises were devised to the widow in fee, or for life.

Lord *Mansfield*.—I verily believe that, almost in every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted; for ordinary people do not distinguish between real and personal property. The rule of law, however, is established and certain, that express words of limitation, or words tantamount, are necessary to pass an estate of inheritance, “ all my estate,” or “ all my interest,” will do; but “ all my lands lying in such a place,” is not sufficient: such words are considered merely as descriptive of the local situation, and only carry an estate for life; nor are words, tending to disinherit the heir at law, sufficient to prevent his taking unless the estate is given to somebody else. I have no doubt but the testator’s intention here was, to disinherit

inherit his heir at law, as well as in the case of *Denn v. Gaslin*; but the only circumstance of difference Ante f. 22. between that case and this, and which has been relied on as in favour of the defendants, if the testator had any meaning by it (which I do not believe he had) rather turns the other way; because he uses different words in devising different parts of his estate. I think we are bound by the case of *Denn v. Gaslin*. Judgment that the widow took only a life estate in the last mentioned premises.

§ 24. Sir *R. Worsley*, being seised in fee of the premises in question, devised them to trustees, upon trust that they should stand seised thereof to the use of his grandson *Robert Earl of Granville* for life, remainder to his first and other sons in tail male; remainder to Lady *Carteret* for life; remainder to her first and every other sons in tail male; and, in default of such issue, “To the use of all and every the daughter and daughters of the body of the said Lady *Carteret*, lawfully issuing, as tenants in common and not as joint-tenants, and in default of such issue, to the use and behoof of his own right heirs for ever.” Hay v. Earl of Coventry,
3 Term R.
83.

Lady *Carteret* had one daughter, Lady *Catherine Hay*; and the question was, what interest she took under this devise?

A case was sent out of Chancery to the Court of King's Bench for their opinion.

Lord Kenyon.—The general rule which is laid down in the books, and on which alone courts can with any safety proceed, in the decision of questions of this kind, is, to collect the testator's intention, from the words he has used in his will, and not from conjecture. It is not necessary, that any technical or artificial form of words should be used in a will ; but we must collect the meaning of the testator from those words, which he has used, and cannot add words, which he has not used. The objection then occurs in this case, "*Voluit sed non dixit.*" The plaintiff's argument goes to shew that the daughters took estates in tail general : but that could not have been the intention of the devisor ; as no such estate is given in any part of the will, and the devisor has totally laid aside the daughters of the first devisee, and the daughters of his sons. The words here used, technically considered, only confer an estate for life on Lady Catherine Hay. It has been argued, that we may presume an intention in the devisor, from other parts of the will, to give estates in succession to the daughters ; but I cannot find any words in the will to warrant such a construction. If indeed the word "*such*" had not been introduced in this clause, we might perhaps have said that, as "*issue*" is "*genus generalissimum,*" it should include all the progeny ; but here the word "*such*" is relative, and restrains the words which accompany it. This case is precisely similar to that of *Denn v. Page*, which was determined in this court in *Mich. 24 Geo. 3.* There the Court held, that sufficient did not appear on the face of the will, to warrant them in saying that an estate of inheritance was given to the daughter ; that, if it were left

Cited 1 Bos.
& Pull. 261.

to

to conjecture, they might suppose that some mistake had been made in the limitation; but they could not determine on conjecture, nor put that in the devisor's mouth which he had not said.

The certificate was, that Lady *Catherine Hay* took an estate for life.

§ 25. Lord *Mulgrave*, having an only daughter, and three brothers, devised his estates in trust to Lord *Longford*, &c. &c. for "my first and every other son in tail male, failure of such issue, to my brother *Henry* and his first and every other son in tail male," and so on to his brothers in the same words, and then to his daughter in the same manner, and concluded with these words, "in all the foregoing cases without impeachment of waste, other than wilful." Then, after making a provision for his daughter, to the amount of 20,000*l.* the will proceeded thus:—"My will is, that the money lodged at *Childs*, to pay for the purchase of the *Lyth* Rectory, be applied to that purchase as soon as Sir *John Sheffield* can complete the title, and the renewals to be made by the tenant for life." It appeared that Sir *John Sheffield* held the rectory of *Lyth* for three lives, under the Archbishop of *Canterbury*.

Roe v. Lord
Mulgrave,
5 Term R.
320.

Lord *Kenyon*, Ch. Just.—The words "*first and every other son*," "*children*," or "*heir*," may be taken to be words of limitation, where it is necessary to give them that construction, in order to effectuate the intention of the testator, as in *Robinson v. Robinson*:

though, ordinarily speaking, they are words of purchase. But, in this case, no doubt can be entertained respecting the devisor's intent. First, he devised to his own "first and every other son in tail male," &c. and if he had no issue, "then to his brother Henry " and his first and every other son in tail male," &c. Now, if he had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, these are precisely the terms in which he would have given such instructions: and, in construing wills, we must take into consideration the short hints of the devisor, in order to discover his intention. To be sure, if the objection "*Voluit sed non dixit*," had occurred, it could not have been got over. We could not have inserted words in a will, which would have varied the construction of those used, even if we thought that the devisor had intended to have used them: but here the intention is sufficiently explained by the words which he has used. And great weight is also due to the subsequent words, which direct the renewal of the life estate to be made "by the tenant for life;" for they can only apply to the devisor's brothers, since there was no other person, who could take a life estate under the will. In some of the cases, indeed, nice distinctions have been made to whom the word "*heirs*," should be applied: but without entering into those niceties, because it is unnecessary in this case, (where the devisor's intention may be collected from different parts of the will) I am clearly of opinion, that on the fair construction of the will, the present Lord

Mulgrave

Mulgrave only took a life-estate, with remainder in tail to his issue.

§ 26. It has been stated that a devise to a person without any words of limitation, charged with the payment of a gross sum of money, or of debts or annuities, creates an estate in fee; but it is laid down in *Collier's Case*, that a devise to a person to the intent that with the profits he should educate his daughter; or of the profits of the land, pay to one so much, and to another so much, was but an estate for life, for he was sure to have no loss.

Though charged with a Payment out of the Estate devised. 6 Rep. 16 a.

Bacon v. Hill, Cro.Eliz. 497.

§ 27. *William Lock* being seised in fee and having several sons, and being bound in an obligation that 40*l.* should be paid annually to his wife during her life, made his will and thereby devised all his lands by several clauses to his several sons, and amongst others he devised the land in question to his sons *Michael* and *Henry*, and added this clause—*Item*, All the houses and lands which I have given between my sons is to this purpose, that they all shall bear part and part alike going out of all my houses and lands, towards the payment of my wife's 40*l.* *per annum* during her life, which I am bound to pay.

Ansley v. Chapman, Cro.Car. 157.

The court resolved that an estate for life only passed by this devise, for it was not devised paying a sum in gross, but that every one should pay out of his part towards the 40*l.* to his wife; which was *quasi* an annual rent out of the profits of the land, and no sum in gross, and therefore no fee was given.

§ 28. A person

Merfon v.
Blackmore,
2 Atk. 341.

§ 28. A person gave all his lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expences were discharged, to *J. M.* It was said by Mr. *Fortescue* M. R. that where a gross sum was to be paid out of the lands, it gave a fee to the devisee of those lands; but here the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore did not come up to the cases cited of a gross sum to be paid out of land, and consequently gave no more than an estate for life to the devisee.

§ 29. It has been laid down in two modern cases; that where the payment of a gross sum of money, or of debts and legacies, is charged on the estate devised, and not on the devisee, such a charge will not operate so as to give the devisee an estate in fee; and, therefore, if no words of limitation are added, he will only take an estate for life.

Denn v. Mel-
lor, 5 Term
Rep. 558.

§ 30. A person devised as follows:—I give and devise unto *N. Lister* all that my customary estate, &c. all the rest of my lands, tenements, and hereditaments, either freehold or copyhold whatsoever and whereforever; and also all my goods, chattels, and personal estate, of what nature or kind soever, after payment of my just debts, and funeral expences, I give, devise, and bequeath the same unto my wife *Sissily Carr*, and appointed her sole executrix. The question was, whether *Sissily Carr* took an estate in fee, or only for life.

Lord *Kenyon* said, that where a devisee is directed to pay an annual rent charge, or a solid sum to another person, out of the estate devised, it had been properly decided that the devisee should take a fee, because he might be a loser, unless the estate in his hands were at all events sufficient to enable him to bear those charges. Where a sum of money was given, it might be payable before the rents became due; and where an annual charge was made on the estate, it might continue beyond the life of the devisee, and, therefore, it was necessary, in both those cases, that the devisee should have a permanent fund. This case had been compared to that of *Doe v. Richards*, Ante ch. 11. but there the words were, “ my legacies and funeral expences being *thereout* paid;” which imported, that those sums were to be paid by the devisee out of the interest given to her: and if she had died immediately after the devisor, and had only taken a life estate, the fund out of which she was to bear those charges might have failed. The court was therefore compelled to make that decision, and he was now perfectly satisfied with it. But, in this case, the words of the will are, “ after payment of my just debts and funeral expences.” Now, supposing the devisor had, in the beginning of the will, charged his debts and funeral expences on his real estate, and had then, after a series of limitations, devised to his wife, in the words now used, it could not have been contended, that such a charge on the real estate would have passed the fee to his wife; and if not, the place in which the same words were introduced could not vary the question.

tion. He admitted, that the real estate was charged with the payment of debts and funeral expences, if the personality was not sufficient for that purpose, but there were no words charging the estate in the hands of the wife with the payment of those debts. This, therefore, essentially differed the present case from that of *Doe v. Richards* ; for there, the debts were to be paid by the devisee, and were a charge on the estate in his hands ; whereas here, the debts were no charge on the devisee.

Judgment was given, that *Siffily Carr* took only an estate for life.

¹ Bof. & Pul.
Rep. 558.

On a writ of error in the Exchequer Chamber, this judgment was reversed, upon the ground, that the words, all the *rest* of the real estate, created an estate in fee.

Upon a writ of error in the House of Lords, the following question was put to the Judges :—" What estate the devisee, *Siffily Carr*, took in the premises " in question ?" And the Judges having taken time to consider the said question, the Lord Chief Baron of the Court of Exchequer delivered their unanimous opinion, that *Siffily Carr* took an estate for life in the premises in question. Whereupon the judgment of the Court of Exchequer Chamber was reversed, and the judgment of the Court of King's Bench affirmed.

§ 31. Previous to the hearing of this case in the House of Lords, the following case was determined by the Court of King's Bench, in conformity to the doctrine laid down by that court in the preceding case.

§ 32. A person made his will in these words:—
As to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth. First, my will is, that all my debts and funeral expences be justly paid off and discharged out of my personal estate, and if the same shall fall short, I do hereby charge my real estate with the payment of the same. I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being, &c. &c. unto *William Allen* of S., son of *Thomas Allen* of S. afore-said, deceased. The question was, What estate passed by these words? And Lord *Kenyon* said, that the debts were not at all events charged upon the real estate, but only contingently, if the personal estate should not be sufficient, and therefore did not come up to the cases cited of a gross sum to be paid out of land, and, consequently, gave no more than an estate for life to the devisee. Judgment was given accordingly.

Doe v. Allen,
8 Term R.
497.

§ 33. It has been stated in a former chapter, that a devise of land, charged with an annual payment to a third person for life, creates an estate in fee: but it is otherwise, where the annual payment is only to continue

Or an Annuity during the Life of the Devisee.
Ch. 11. f. 64.

tinue during the life of the person to whom the land is devised.

Ager v. Pool,
Dyer 371 b.

§ 34. A person devised to *D.* his wife, yielding and paying therefor yearly during her natural life to the right heirs of his father forty shillings, &c. The court was of opinion, that *D.* took only an estate for life.

The word
Estate, when
descriptive of
local Situation.

§ 35. It has been stated in a former chapter, that the word estate will create a fee-simple, when it appears to have been used by a testator to denote all his interest in the lands devised. But where it appears to have been descriptive of the local situation of the lands devised, it will then pass only an estate for life.

Chester v.
Painter,
2P.Wms.335.

§ 36. Upon an appeal to the King in council from a decree made in the island of *Antigua*, the case was— a person, having real and personal estate, gave and bequeathed one-third part of all his estate whatsoever to his wife *Ann*; and devised to his son *John*, and to his heirs, two-thirds of all his real and personal estate. It was determined by Lord *Raymond*, Sir *Joseph Jekyll*, and Lord Chief Justice *Eyre*, that the wife took only an estate for life, the word estate being rather a description of the thing itself, than of the testator's interest in it; and by the next clause, it appeared, that where the testator intended to give a fee, there he took care to add the word heirs, to the word estate.

§ 37. A per-

§ 37. A person having devised his estate to his nephew *Thomas Hutton* and his heirs, added these words ;
 “ and if my said nephew shall have no issue male, then
 “ my said estate shall go to the daughter or daughters
 “ of my brother *Richard*, and to the daughter or
 “ daughters of my brother *Mathew*, remainder to his
 “ right heirs.” And the question was, whether, by
 the devise of the estate to the daughters of *Richard*
 and *Mathew*, an estate in fee, or for life, passed ?
 The court was clearly of opinion, that an estate for
 life only, passed to the daughters ; for as it was argued,
 that although in grants, and also in wills, the word
 estate was sufficient to carry a fee, yet, in this case,
 where the consequence was the disinheriting an heir at
 law, a fee should not pass thereby, unless the intent
 of the testator was very plain and apparent for that
 purpose. That the intent was not so apparent, as to
 force the court to put such a construction on the devise
 to the daughters, as was insisted on ; but, on the con-
 trary, from the contexture of the whole will, it seemed
 plain that the word estate was always, and particularly
 in the devise in question, used as descriptive only, and
 synonymous with lands ; so that, here, it would be
 putting a force on it, to make it carry a fee. And
 besides, the devise over to the testator’s heirs, shewed
 that he thought he had a farther interest to dispose of
 after the devise to the daughters, to whom he did not
 seem to intend so much as an estate tail.

Rogers v.
 Briggs,
 Andrew’s
 Rep. 210.

§ 38. The word hereditaments only creates an estate
 for life in a will, for it does not denote the measure or
 quantity

The Word
 Heredita-
 ments only
 passes an
 Estate for
 Life.

5 Term R.
559.-8.-503.

quantity of estate, as it has a proper and appropriate meaning, and extends to annuities, advowsons in gross, and many other things.

§ 39. There are several other cases where an estate for life only has been held to pass, by a devise which will be stated in the next chapter.

TITLE XXXVIII.

D E V I S E.

CHAP. XIV.

Construction.—Of the Rule in Shelley's Case.

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| <p>§ 2. <i>Applied in Devises of legal Estates.</i></p> <p>8. <i>Though the Limitation to the Heirs be only mediate.</i></p> <p>11. <i>Though the Estate for Life arise by Implication.</i></p> <p>13. <i>Applied where the Word Heir in the Singular Number is used.</i></p> <p>18. <i>And where there are super-added Words to the Word Heirs.</i></p> <p>23. <i>And to Devises of Trust Estates.</i></p> <p>31. <i>And to Devises of Copyholds.</i></p> <p>33. <i>And to Devises of Terms for Years.</i></p> <p>34. <i>Cases in which the Rule is not applied.</i></p> <p>35. <i>Where the Limitation is to Sons or Children.</i></p> | <p>40. <i>Where Words of Explanation are added to the Word Heirs.</i></p> <p>46. <i>Where Words of Limitation are added to the Word Heir.</i></p> <p>49. <i>Heirs with Words limiting an Estate of a different Nature.</i></p> <p>50. <i>Where the Remainder is to the Heir for Life.</i></p> <p>52. <i>Where the Word Issue is used with Words of Limitation.</i></p> <p>56. <i>Unless the general Intent require a different Construction.</i></p> <p>60. <i>Where a Trust is created and a Conveyance directed.</i></p> <p>69. <i>Where the Estates are of different Natures.</i></p> <p>73. <i>Case of Perrin v. Blake.</i></p> <p>75. <i>Conclusion.</i></p> |
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Section 1.

THE rule laid down in *Shelley's case*, of the origin and nature of which an account has been already given, having been established for purposes of general utility, has been adopted in the construction of devises, as well as in that of deeds. But it being a principle of law, that the intention of the testator is to be the chief

Tit. 32. c. 25.

Fearne Cont.
Rem. 290.
299.

guide in the expounding of devises ; it has been often doubted how far the application of this rule should be extended, in contradiction to the intention of the testator.

Applied in
Devises of
legal Estates.

§ 2. It has, however, been uniformly determined in all cases of devises of legal estates, that wherever lands are given to a person for life, or for any greater estate, with an immediate remainder to the heirs, or heirs of the body of such devisee, the words, “heirs,” or “heirs of the body,” shall operate as words of limitation ; and give the devisee an estate in fee, or in tail.

Rundale v.
Eeley,
Cart. 170.

§ 3. A person devised lands to his son *John*, to hold to the said *John* for life ; and after his decease then to the use and behoof of the heirs males of his body ; and, for default of such issue to *Robert* and the heirs males of his body. It was resolved, that these words created an estate tail, as well in a will, as in any other conveyance. The estates could not stand together ; but the estate for life was swallowed up in the estate tail : and the same rule held, where an estate of freehold was limited to a man for life, remainder to the heirs of his body ; it was an estate tail in a devise as well as in a deed.

§ 4. Although it should appear from other circumstances, besides an express devise for life, that the testator did not intend to give the first devisee a greater estate, such as a power to settle a jointure, with the concurrence of trustees ; or an interposed estate to trustees

trustees to preserve contingent remainders ; or a clause, that the devisee's estate should be without impeachment of waste ; yet the courts have applied the rule, and given the devisee an estate of inheritance.

§ 5. A person devised lands to trustees and their heirs, to the intent and purpose that they should permit and suffer *A.* to receive and take the rents and profits for and during the term of his natural life ; and after his decease should stand seised of the same lands to the use of the heirs of the body of *A.* with a proviso, that the trustees and *A.* might make a jointure for his wife. It was determined, first, that this devise passed a legal, and not a trust estate. And, secondly, that *A.* took an estate tail.

Broughton v. Langley,
2 *Ld. Raym.*
273.

Tit. 12. c. 12
f. 14.

§ 6. Lands were devised to *B.* for life, without impeachment of waste ; remainder to trustees and their heirs during the life of *B.* to support contingent remainders, remainder to the heirs of the body of *B.*, remainder over.

Papillon v. Voice,
2 *P. Wms.*
471.

Sir *Joseph Jekyll* was of opinion, that an estate for life only passed to *B.*, with remainder to the heirs of his body, by purchase. But, upon an appeal to Lord *King*, he said the remainder to the heirs of the body of *B.* was within the general rule ; and must operate as words of limitation, and consequently create a vested estate tail in *B.* ; and that the breaking into this rule would occasion the utmost uncertainty.

Perrin v. Blake, *infra.*

Sayer v.
Masterman,
Ferne Cont.
Rem. 250.
Amb. 344.

§ 7. A person devised in these words ; “ I give to my loving brother G. S. and the heirs of his body, the males having preference as aforesaid, and succeeding according to their births, and to preserve contingent remainders from being barred during the life of the said G. S. I give the said estates and farms to my said friend Dr. R. and on failure of issue of the said G. S. I give the said estates and farms to my niece M. C.”—The court referred to Lord King’s opinion in *Papillon v. Voice*, that the limitation to trustees did not control the estate tail, and declared that G. S. was intitled to an estate tail.

Though the
Limitation to
the Heirs be
only mediate.

§ 8. Where the remainder to the heirs, or heirs of of the body, of the devisee for life, is only mediate; by the interposition of some other estate; the devisee will take an estate in fee or in tail, in remainder, to take effect in possession, upon the determination of the interposed estate; and the estate for life is not merged in the remainder.

Coulson v.
Coulson,
2 Atk. 247.

§ 9. *Robert Bromley* being intitled to a reversion in fee in certain lands, expectant on the death of *Elizabeth Foster*, devised the same to *Robert Coulson* for life; remainder to trustees during his life, to preserve contingent remainders; remainder to the heirs of the body of the said *Robert Coulson*; remainder over. The question was, what estate *Robert Coulson* took under this devise? The case having been sent by the Court of Chancery to the Court of King’s Bench, the Judges of that court sent the following certificate.—
“ We have heard counsel in the question referred by
“ your Lordship to us; and, as it appears by the state

“ of the case, there is, after the determination of the
 “ estate for life of *Robert Coulson*, a devise to *J. B.*
 “ and *R. R.* and their heirs, for and during the life of
 “ *Robert Coulson*; we are of opinion, that by reason
 “ of the remainder, interposing between the devise to
 “ *Robert* for life and the subsequent limitation to the
 “ heirs of his body, the said *Robert* took an estate for
 “ life, not merged by the devise, to the heirs of his
 “ body; but by that devise an estate tail in remainder
 “ vested in the said *Robert*.”

Against this certificate the counsel cited 2 *Roll. Ab.* Forrest MSS. 418. pl. 4, 5. to prove the remainder to the heirs of the body contingent; but, after looking into the book, Lord *Hardwicke* paid no regard thereto; and decreed according to the Judges' opinions.

§ 10. *Susan Jolland* devised certain lands to the use and behoof of her sister *Elizabeth*, the wife of *John Belchier*, and her assigns, for and during the term of her natural life; and, after the determination of that estate, to the use of *William Arnold* and *Isaac Pennington*, and their heirs, during the life of the said *Elizabeth*; upon trust to preserve the contingent uses and estates therein after limited from being defeated or destroyed; and for that purpose to make entries and bring actions, &c. and from and after her decease, then to the use and behoof of the heirs of the body of the said *Elizabeth* lawfully issuing; and, for want of such issue, to the use and behoof of her sister *Catherine Jolland* spinster, in the same words as are used in the devise to *Elizabeth*. *Elizabeth Belchier* died in the lifetime of the testatrix; leaving issue one

Hedgson v. Ambrose,
Doug. 337.
 3 Bro Parl.
 Ca. 416.

daughter, *Catherine Belchier* : Upon the death of the testatrix, *Catherine Jolland* (who married one *Hodgson*) suffered a recovery of the premises. A question having arisen in the Court of Chancery respecting the construction of this will, a case was made for the opinion of the Judges of the Court of King's Bench, upon the following questions :—" First, Whether *Catherine Belchier*, the daughter of *Elizabeth Belchier*, took any and what estate under the will of *Susan Jolland*?—And secondly, What estate *Catherine Hodgson* (late *Jolland*) took under the said will?"—The Judges of the Court of King's Bench gave their opinion in the following words :—" If *Elizabeth Belchier* would have taken an estate tail, in case she had survived the testatrix, we think by her dying before the testatrix, it is a lapsed devise; and *Catherine*, the daughter of *Elizabeth*, can take nothing."

" As to the question, whether *Elizabeth* would have taken an estate-tail, whatever our opinions might be if the case were new, we think as the case of *Coulson v. Coulson* is literally the same, the precise question ought not to be again litigated; and by that authority we are bound to say in the words of the certificate in that case, that as it appears by the state of the case, that there is, after the determination of the estate for life to *Elizabeth Belchier*, a devise to *William Arnold* and *Isaac Pennington*, and their heirs, for and during the life of *Elizabeth Belchier*, we are of opinion that *Elizabeth Belchier*, if she had survived the testatrix, would have taken

“ an estate for life in the premises devised to her, not
 “ merged by the devise to the heirs of her body, but
 “ by that devise an estate tail in remainder would have
 “ vested in the said *Elizabeth*; consequently *Catherine*
 “ *Belchier*, the daughter of *Elizabeth*, took no estate
 “ under the will of *Susan Jolland*: but *Catherine*
 “ *Hodgson*, late *Catherine Jolland*, took an estate for
 “ life in all the devised premises, not merged by the
 “ devise to the heirs of her body; but by that devise
 “ an estate tail in remainder vested in the said *Catherine*
 “ *Jolland*.”

The Lord Chancellor having decreed in conformity to this certificate, an appeal was brought in the House of Lords; and the following questions were put to the Judges; First, “ Whether *Catherine Belchier*, the daughter of *Elizabeth Belchier*, took any and what estate under the will of *Susan Jolland*?” Secondly, “ What estate *Catherine Hodgson*, late *Jolland*, took under the said will?” And the Lord Chief Baron of the Exchequer having delivered the unanimous opinion of the Judges present, upon the first question, that *Catherine Belchier* took no estate under the will of *Susan Jolland*; and, upon the second question, that *Catherine Hodgson*, late *Jolland*, took an estate for life in all the premises, not merged by the devise to the heirs of her body; and that by that devise an estate tail in remainder vested in the said *Catherine Jolland*: it was ordered and decreed, that the appeal should be dismissed, and the decree therein complained of affirmed.

Thong v.
 Bedford,
 1 Bro. Rep.
 313.

Though the
Estate for Life
arise by Im-
plication.

§ 11. Though no estate for life be expressly devised, but only arises by implication, yet the rule will be applied.

Hayes v.
Foord,
2 Black R.
698.

§ 12. *John Foarde* made his will, having then two sons, *Rawlinson* and *William*, and a brother *Nicholas*; who had then also two sons, *James* and *Nicholas*: and gave his real estate to his eldest son *Rawlinson*, at his age of twenty-three, “to enjoy the whole during his life. And the whole estate (of which he is only tenant for life) shall, after his decease, go to his eldest son that shall be then living; and if he dies without any son or sons to enjoy it, (of which none are or shall be tenants, but while they live to enjoy it,) that then it shall come to his brother *William Foarde* during his life, and to any of his heirs males during their lives, and no longer; and, if they die without issue male, then to the heirs males of my brother *Nicholas Foarde's sons*, and to any of their heirs males during their lives, (of which none of them are tenants any longer, nor shall it be in any of their powers to sell, dispose, or make away, any part or the whole of it); and, in case they all die without heirs male, then it is to go to the next of kin of me.”

At the same time and with the same solemnities, the testator published a schedule referred to in the said will; and which the special verdict found to be part of his will, containing a very particular account of all his real and personal estate; the title to which schedule was in these words:—“An account, how I dispose of
“ my

“ my estate to my son *Rawlinson Foorde*, as followeth;
 “ he paying his mother out of my real estate the sum
 “ 15 *l. per annum*, during her life, and 24 *l. per annum*
 “ out of my mortgages; and then all to revert to my
 “ son *Rawley Foorde* during his life, and after his death
 “ to his sons; and for want of sons to his brother
 “ *William Foorde* during his life, and after his death
 “ to his sons; and, for want of sons to his brother
 “ *William Foorde* during his life, and afterwards to
 “ *William Foorde’s* eldest son, and for want of his
 “ having sons to my brother *Nicholas Foorde’s* sons;
 “ and for want of any eldest sons, to my eldest son’s
 “ daughters, and so to the next of kin.”

Rawlinson and *William*, the two sons of the testator, died without issue male. *James*, the eldest nephew died before *William* the son; and, upon *William’s* death, *Nicholas* the youngest nephew entered and suffered a recovery.

On this special verdict the question was, whether *Nicholas* the nephew took an estate for life or in tail, under the will and schedule. The Court of King’s Bench in *Ireland* was of opinion, that he took only an estate for life.

Upon a writ of error, Lord *Mansfield* delivered the opinion of the court—“ That the only doubt was,
 “ whether by the words of the will *Nicholas* the
 “ nephew of the testator, took any estate by implica-
 “ tion? That this doubt was removed by the schedule,
 “ which expressly gives an estate to the sons of his
 “ brother

“ brother *Nicholas Foorde*. That, therefore, *Nicholas*
 “ the nephew took an estate for life by implication,
 “ thus explained ; which being conjoined to the estate,
 “ expressly given to his heirs males, will, by the
 “ known rules of law, give him an estate in tail male.”

Applied
 where the
 Word Heir,
 in the Singu-
 lar Number,
 is used.

§ 13. Although the limitation be to the heir, in the singular number, yet the rule will be applied, and the first devisee will be construed to take an estate tail.

Burley's Case,
 1 Vent. 230.

§ 14. Thus, Lord *Hale* says, it was adjudged in 43 *Eliz.* that a devise to *A.* for life, remainder to the next heir male, and, for default of such heir male, then to remain over, was an estate tail.

Wilkins v.
Whiting,
 1 Roll. Ab.
 836.
Bulst. 219.
 2 Vern. 324.

§ 15. A person devised lands to his youngest son for ever, and, after his death, to the heir male of his body for ever, and, for default of such heir male, to *E.* his eldest son for ever. It was resolved, that the youngest son took an estate tail.

Miller v.
Seagrave,
Rob. Gav.
 96.

§ 16. Thus, in a case cited by Mr. *Robinson*, where there was a devise to Serjeant *Miller* and his wife for their lives, remainder to the next heir male of their two bodies, it was held, that this was a devise in tail ; for a devise to the heir male is a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of *Archer's* case. But the words, “ first, next, or eldest,” or any like words superadded, made no difference.

Infra.

§ 17. *Sir*

§ 17. Sir *T. Trollop* devised the manor of *A.* to his first son *William* for life, remainder to the heirs males of his body, remainder to his second son *Thomas* for life, and, after his death, to the first heir male of his body. The court held, that the words, “heir male,” were to be understood collectively, and that *Thomas*, the second son, took an estate tail; it appearing, that such was the testator’s intention by the other devises. And this stood distinguished from *Archer’s* case, no limitation being superadded to the words “first heir male;” and the word “first” should be understood first in order of succession from time to time.

Dubber v. Trollop, Rob. Gav. 96. Amb. 453.

§ 18. A devise to the heirs, or heirs of the body of a prior devisee for life, with superadded words of limitation, will be construed within the rule in *Shelley’s* case.

And also where there are superadded Words to the Word “Heirs.”

§ 19. A person devised to *Nicholas Lisse* for his life, and, after the decease of the said *Nicholas*, he devised the same unto the heirs males of the body of the said *Nicholas* lawfully to be begotten, and his heirs for ever; but, if the said *Nicholas* should happen to die without such heir male, then he devised over. The Judges were all of opinion, that this was an estate tail in *Nicholas*: and they held, that if the subsequent words relied on as *his*, and, if he died *without such heir male*, were not sufficient to restrain and alter the operation of the words “*heirs males*,” and so qualify them as to make them a description of the person; and that the operation of plain and clear words, and a settled rule of law, should not be defeated, or broke into,

Goodright v. Pullyn, 2 Ld. Raym. 1437. 2 Stra. 729.

by

by uncertain or doubtful words, which they took the last at least to be.

§ 20. The following case was sent by the Lord Keeper to the Judges of the Court of Common Pleas for their opinion :

Legate v.
Sewell, 1 P.
Wms. 87.

George Legate devised his lands, in default of issue of his own body, unto his nephew *William Legate*, for and during the term of his natural life, and, after his decease, to the heirs male of the body of his said nephew lawfully to be begotten, and the heirs males of the body of every such heir male, severally and successively as they should be in priority of birth; and, for want of such issue, to his brother, &c. Whether *William Legate* the nephew had an estate tail vested in him, or an estate for life only, in the lands to him devised? Three of the Judges were of opinion, that *William Legate* had an estate tail vested in him: and Mr. Justice *Tracey* certified, that he had only an estate for life. Mr. *Peere Williams* says, that the court, appearing not to be satisfied with the certificate of the three Judges, directed an ejectment to be brought in B. R. in order to have the matter settled; but that it was said the parties agreed, and so the question was not determined. Yet, in 2 *Vesey* 657, Lord *Hardwicke* says, that Lord *Cowper* held himself bound to agree with the three Judges, and so decreed.

Minshull v.
Minshull,
1 Atk. 411.

Morris v.
Ward,
8 Term R.
518.
2 Burr. 1102.

§ 21. *Thomas Wardell*, seised in fee, had issue a daughter named *Lucretia*, and by his will devised thus:—“ I give and bequeath unto my daughter *Lucretia*,

Lucretia, wife of *G. Andrews*, all my plantation, together with the negroes, &c. charged, &c. during the natural life of my said daughter. Item, I bequeath to the heirs of the body of my said daughter *Lucretia*, begotten or to be begotten, and to his or her heirs for ever, after my said daughter's decease, all my before mentioned plantations, &c.; but, for want of such heirs of the body of my said daughter, I also give and bequeath the aforesaid premises, after the decease of my said daughter, to my own next heirs, and their heirs, for ever. This case came before the Privy Council upon an appeal from *Barbadoes*; and the following reasons were used in the printed case. "It is a general rule of law, that, when an estate is limited to one for life, a limitation afterwards to the heirs of the body of that same person creates an estate tail: and, though this be in the case of a will, there is no reason to depart from that rule; for, if *Lucretia* were construed to have an estate for life only, then the remainder to the heirs of her body would be words of purchase. And then, though she had several sons, yet the eldest only would have been heir, and the younger sons would never have taken under that limitation; though it was clearly the testator's intention, that all her sons should take, by using the word *heirs*, in the plural number. And the subsequent clause, 'for want of such heirs of the body of my said daughter, to my own next heirs and their heirs for ever,' is a further explanation of his meaning, that his daughter should take an estate tail, with a remainder to his own right heirs." (Signed) *N. Fazakerly*, *D. Ryder*. This was heard before

before the Privy Council 18th *March* 1730; when it was ruled, that *Lucretia* took an estate tail. The Chief Justices, *Raymond* and *Eyre*, assisted at the decision; judgment was affirmed. And Lord *Kenyon* has said, that, though the above were only the reasons of the counsel in that case, they contained as much good sense and sound law, as if they had had the authority of all the judges of *England*.

§ 22. There are, however, some cases, in which superadded words of limitation may controul the word heirs, so as to render them words of purchase; of which, an account will be given hereafter.

And also to
Devises of
Trust Estates.
Sweetapple v.
Bindon,
Tit. 5. c. 2.
f. 18.

§ 23. In devises of trust estates, the construction is the same in the Court of Chancery as it would be in a court of common law, upon a devise of legal estate: so that the rule in *Shelley's* case is there applied to the construction of devises, as well as at law.

Bale v. Coleman, 1 P.
Wms. 142.

§ 24. One devised lands to four persons and their heirs for payment of debts, and, afterwards, to the use of them and their heirs; after which, by a codicil, he devised that his will should stand, saving that, when his debts were paid, *A.*, who was one of the four devisees in the will, should have his share of the lands to himself for life, with a power to make leases for 99 years determinable on three lives, remainder to the heirs male of his body, remainder over. Lord *Cowper* was of opinion, that *A.* ought to be tenant for life only, with remainder to his first and other sons in tail male: but, the case coming on before Lord *Harcourt*
on

On a rehearing, his Lordship said,—“ This being the
 “ case of a will, differs from the several cases that
 “ have been cited of marriage articles, in the nature
 “ of which, the issue are particularly considered, and
 “ looked upon as purchasers; and for which reason,
 “ the court has restrained the general expressions made
 “ use of by the parties: for it cannot reasonably be
 “ supposed, that a valuable consideration would be
 “ given for the settlement of an estate, which, as soon
 “ as settled, the husband might destroy. But no case
 “ has been cited, where, upon the words of a will,
 “ or the parties claim voluntarily, the like decree has
 “ been made. In all such cases, the testator’s intent
 “ must be presumed to be consistent with the rules of
 “ law; and, at law, these words would certainly
 “ create an entail: neither can it be inferred, with any
 “ certainty, from the power of leasing given by the
 “ testator, that no estate tail was intended; in regard,
 “ such power of leasing is more beneficial than that
 “ given to tenant in tail by statute. And as the debts
 “ are admitted by the pleadings to be all paid, the
 “ same construction is now to be made, as if there
 “ had been originally no trust. So decree *A.*’s share
 “ or fourth part to be conveyed to him, and the heirs
 “ male of his body, remainder over,” &c.

§ 25. The doctrine laid down in the preceding case was contradicted, in fact, by Lord *Hardwicke*, in the case of *Bagshaw v. Spencer*, which was a devise of a trust estate to *B. B.* for his natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the use and behoof of the heirs of the body of *B. B.* begotten, and, for

Collect. Jur.
v. I. 372.

want of such issue, then over. And he held that *B. B.* took an estate for life only: for, if a conveyance had been prayed, there must have been a limitation to trustees, to preserve contingent remainders; and then the next limitation must have been to the first and other sons of *B. B.* in tail general. But this case is now not held to be any authority, as it was contradicted by Lord *Northington*, in a case which will be stated hereafter, and also by a determination of Lord *Thurlow*.

Vide *Fearne*
Cont. Rem.
195.

Garth v.
Baldwin,
2 Ves. 646.

§ 26. Sir *Edward Turner* devised all his real estate to *Charles Baldwin*, in trust to pay the rents to *Sarah Garth* for her life, and, after her death, to pay the same to *Edward Turner Garth* her son for life, and afterwards to pay the same to the heirs of his body. Lord *Hardwicke* said, that, upon the construction of this will, he was obliged, by the rules of law and equity, to direct the conveyance to be to the son in tail; because, in limitations of a trust, either of real or personal estate, to be determined in the Court of Chancery, the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of the testator, or author of the trust, plainly appears to the contrary. But, if the intent does not plainly appear to contradict and overrule the legal construction of the limitation, it was never laid down, nor was it by him in the case of *Bagshaw* and *Spencer*, that the legal construction should be overruled by any thing but the plain intent. That he was not, in a court of equity, to overrule the legal construction of the limitation; unless the intent of the testator,

testator, or author of the trust, appeared by declaration plain, that is, not saying it in so many words, but plain expression, or necessary implication of his intent, which was the same thing.

§ 27. *Henry Rayney* having five grandchildren, devised all his freehold estates to trustees and their heirs, in trust to raise a sum of money for his grandchildren, and subject thereto, to the use of his nephew *T. Rayney* and his assigns for his life, remainder to trustees to preserve contingent remainders, remainder to the use of the heirs male of the said *T. Rayney* begotten, and their heirs: provided, that in case the said *T. Rayney* should die without leaving any issue male of his body living at his death, then, and in such case, he subjected the premises to the payment of 100 *l.* a piece to his two nieces; and, for default of such issue male of his said nephew *T. Rayney*, then as to all the premises, to his five grandchildren, or such as should be living at the time of the failure of issue male of the said *T. Rayney*, their heirs and assigns: provided, that the said *T. Rayney* should be put out apprentice to a surgeon, or sent to *Cambridge*; and in case he should refuse to be an apprentice, or to go to *Cambridge*, then his will was, that the estate, so before limited to the said *T. Rayney* for his life, should cease and determine, and be void, as if he had been dead; and that the said premises, so limited to the said *Thomas* for his life and his issue male as aforesaid, should from thenceforth revert over, and go to such of his grandchildren as should be living, and to their heirs. *Thomas Rayney*

Wright v.
Pearson,
Amb. R. 358.
Fearne Cont.
Rem. 187.

died without issue, having suffered a recovery of the premises.

Lord Keeper *Henley* thought that *Thomas Rayney* took an estate tail, from the intent of the testator; who plainly intended the heirs male, &c. should not take an estate in fee, which they must, if they took as purchasers. He was considering, he said, whether he could not make this construction, viz. to *Thomas* for life, then to his heirs male in tail, then to the grandchildren. And, if the limitation had been, for default of such heirs of the body, he might have considered it as heirs of the body of the heirs male, &c. mentioned before: but the limitation there was, for default of such issue male, &c. He thought the words, “and their heirs,” in the will, were redundant and superfluous; and that *Thomas Rayney* took an estate tail, and, consequently, that the recovery suffered by him was good. And though it was a rule never to reject words in a will, if they could stand, yet he must do it in this case, to support the testator’s intent.

Austen v.
Taylor,
Amb. 376.

§ 28. *John Holman* gave all his estate to trustees and their heirs, to the uses, trusts, and purposes therein mentioned; first to the intent, that his sisters should receive an annuity for their lives, and subject thereto, in trust for the plaintiff for life, remainder to trustees to preserve, &c. remainder to the heirs of the body of the plaintiff, remainder to his own right heirs. And he also gave the residue of his personal estate to trustees, in trust to buy lands in fee, which he directed should remain, continue, and be, to, for, and upon such

such and the like estate and estates, trusts, intents, and purposes, as were by him before devised, limited, or declared of and concerning his lands and premises therein-before devised, or as near thereto as might be, and the deaths of persons would admit. Upon a bill to have the residue laid out according to the will, the question was, Whether the plaintiff was entitled to an estate for life, or in tail, in the lands to be purchased?

Lord Keeper *Henley* said, the question arose upon the intent of the testator. It was argued, that if the intent was plain, yet, if the testator had used words which, by the rules of law, imported a different signification, the rule of law, and not the intent, would prevail; but there was no such rule applicable to this case. In case of a will, the intent should prevail, if not contrary to law; the meaning of which was, if the limitations were such as the law allowed; but did not mean that the words must be taken in such signification as the law imposed on them. If words which, in consideration of law, were generally taken to be words of limitation, appeared in a will to be very plainly intended as words of purchase, they should be considered as such, both in courts of law and equity. But the safe way to determine property, was to use words in the most known sense, unless it appeared plainly that the testator meant them in some other.

Decreed, that the plaintiff was entitled to an estate tail,

Jones v.
Morgan,
1 Bro. Rep.
206.

§ 29. Sir *William Morgan* devised an estate to trustees to raise money in aid of his personal estate, for the payment of his debts, and, after payment thereof, then to stand seised to the use of his son *William* for and during the term of his natural life, without impeachment of waste; and from and after his decease, to the use and behoof of the heirs male of the body of his said son *William* lawfully to be begotten, severally, respectively, and in remainder, one after another, as they and every of them should be in priority of birth and seniority of age; and, for default of such issue, to any after born son he might have; with a power, while in possession, of leasing, making a jointure, and raising portions for younger children. The question was, Whether *William* the son took an estate in tail, or for life only?

Lord *Thurlow* said, he could not distinguish this case from that of *Wright v. Pearson*, with which the case of *Bagshaw v. Spencer* could not stand. It had been contended that, however it might be at law, it should be construed otherwise in equity, for that the whole fee was given to the trustees, as it might be necessary for the payment of the debts; but after payment of the debts, the testator did not mean to leave any thing executory: no, the trustees were to stand seised to the subsequent uses. If this was not a legal estate, it was only not so, because the first use might absorb the whole estate; then the only question was, whether, under the cases decided, he must consider this point as being different in the case of legal and equitable estates. In *Garth v. Baldwin*, the construction restored the law, that

that trusts were to be considered in the same manner as legal estates. If that were so, there could not be a more proper case to apply the rule than this, as there could be nothing so near to a legal estate as the present; he thought therefore the same rule of construction must apply in equity as at law, and decreed that *William* took an estate tail.

§ 30. Where the Court of Chancery is called upon to direct a conveyance to be made under a will, the construction has been different; of which an account will be given hereafter.

§ 31. The rule in *Shelley's* case has been applied in the construction of devises of copyholds, as where a person who had surrendered his copyhold to the use of his will, devised it to *B.* for life, and after his death to the heir of his body begotten. It was held that the word heir being *nomen collectivum* was equivalent to the word heirs, in the plural number; and so *B.* took a fee executed, and his heir should have it by descent, and not by purchase. Lord Ch. Baron *Gilbert* has observed on this case that it must have been meant of a fee tail, because the heirs were restrained to the body of *B.*

And to De-
vises of Copy-
holds,
Tit. 37. c. 1.
Lawsey v.
Lowdell,
2 Roll. Ab.
253. pl. 4.]

Ten. 270.

§ 32. In ejectment the Chief Justice ruled this case. *A.* surrendered a copyhold estate to the use of his will, and then devised it to *B.* for life, and after his decease to the heirs of his body. *B.* died in the lifetime of the testator. And it was held that his heir could take

Busby v.
Grunslate,
1 Stra. R.
445.

Vide ch. 8.

nothing, for it was a devise in tail to *B.* and the words, heirs of his body were words of limitation.

And to De-
vices of Terms
for Years,
Ferne Ex.
Dev. 300.

§ 33. The rule in *Shelley's* case has also been applied in the construction of devises of terms for years; and therefore if a term be devised to *A.* for life, and afterwards to the heirs of his body, these words are generally words of limitation, and the whole vests in the first taker. But if there appears any other circumstance or clause in the will to shew the intention that these words should be words of purchase, and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase.

Cases in
which the
Rule is not
applied.

§ 34. As the intention of the testator has always been allowed to be the guide in the construction of wills, where it is not repugnant to any rule of law; several cases have arisen, in which the rule in *Shelley's* case has not been applied.

Where the
Limitation is
to Sons or
Children.

§ 35. The rule in *Shelley's* case does not apply to the words “sons,” or “children;” and therefore a devise to *A.* for life, with remainder to his sons or children, or to his first and other sons or children, gives an estate for life only to *A.*

§ 36. Thus, Lord *Hale* has cited a case, stated in *1 Roll. Ab.* 837. pl. 13. where a person devised to his eldest son for life, (*et non aliter*) and after his decease to the sons of his body; and it was held to be an estate for life only in the son. And the usual mode of creating a strict settlement by will is, to devise to the
eldest

eldest son for life, with remainder to his first and other sons successively, and to the heirs male of their bodies.

§ 37. A person devised his estate to his son for life, and after his decease to the male children of the said son, successively, one after another as they were in priority of age, and to their heirs; and, in default of such male children, he gave the same to the female children of the said son, and their heirs; and, in case the said son should die without issue, then he devised the premises to his grandson in fee. It was resolved, 1st, That the devisee did not take an immediate estate tail by the devise to his male and female children. And 2d, That, under the words—"in case the said son should die without issue," he did not take an estate tail by implication in remainder, after the limitation to his children.

Ginger v. White,
Willes Rep.
348.

§ 38. A will was made in these words—"My will is, that my son shall have and enjoy the manor of B. only for his life, and then the premises shall descend and come to his male children, if he have any, for their natural lives only, and to the male children descending from them." It was resolved, that the son took an estate for life only.

Goodtitle v. Wodhull,
Willes Rep.
592.

§ 39. A person devised a house to his son for his life, and after his death unto all and every his children equally and to their heirs; and, in case he died without issue, he gave the premises to his daughters. It was admitted, that the son took an estate for life only.

Goodright v. Dunham,
Doug. 264.

§ 40. Where

Where Words
of Explana-
tion are added
to the Word
Heirs.

§ 40. Where an estate is devised to a person and his heirs, or to the heirs of his body, and there are words of explanation annexed to the word heirs; from whence it may be collected that the testator meant to qualify the meaning of the word “heirs,” and not to use it in its technical sense, but as a description of the person or persons to whom he intended to give his estate after the death of the first devisee, the word “heirs,” will in that case operate as a word of purchase.

Lowe v.
Davies,
2 Ld. Raym.
1561.

§ 41. A person devised to his son *B. I.*, and his heirs lawfully to be begotten, that is to say; to his first, second, third, and every son and sons lawfully to be begotten of the body of the said *B.* and the heirs of the body of such first, second, third, and every son and sons successively, lawfully issuing; and in default of such issue then to his right heirs for ever. It was resolved, that *B. I.* took only an estate for life; the word “heirs” being fully explained by the subsequent words to be a word of purchase.

Doe v.
Laming,
2 Burr. 1100.
1 Black. R.
265.
Rob. Gav. 95.

§ 42. Lands held in gavelkind were devised to *Ann Cornish* and the heirs of her body lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common and not as joint-tenants.

Lord *Mansfield* said, that the devise could not take effect at all, but would be absolutely void, unless the heirs of the body of *Ann Cornish* took as purchasers.

The

The lands devised were gavelkind ; and it was manifest the testator did not mean that his estate should go in a course of descent in gavelkind, for he gave it to the heirs of the body of *A. C.* as well females as males ; therefore, they could not take otherwise than as purchasers. It would be a void devise, if the words were to be construed as words of limitation ; for the testator breaks the gavelkind descent by giving it to females as well as males. He likewise added—"and to their heirs and assigns for ever, to be divided equally, share and share alike."—Nay, he went farther, "as tenants in common and not as joint-tenants." But this could not be, if they were to take in a course of gavelkind descent ; for in such case they must have taken as coparceners. Upon the whole, as no man could doubt of the testator's intention, and as this was the only method of effectuating it ; and as there was no rule of law that prevented heirs taking as purchasers, where the intention of the testator required it, so he was of opinion that the words, "heirs of the body," were words of purchase. Judgement was given accordingly,

§ 42. A person devised to trustees to the use of, and in trust for her sister *Margaret Davie* and her assigns, during her natural life, without impeachment of waste, remainder to the same trustees to preserve contingent remainders ; and from and after her decease then to the use of and in trust for the heirs male of the body of the said *Margaret*, to be begotten, severally and successively and in remainder one after another, as they and any of them should be in seniority of age and priority

Goodtitle v.
Hering,
1 East. 264.

priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies: and for want and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said *Margaret* to be begotten, to be equally divided amongst them if more than one, share and share alike, to take as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters, and in default of such issue, &c.

Lord *Kenyon* said, he had not the smallest doubt upon the case; the intention was most obvious to give the first taker only an estate for life; but, if that intention could not be carried into effect without shaking a positive rule of law, he should certainly bow to the decisions. The case of *Coulson v. Coulson* went on that ground, and so afterwards did *Perryn v. Blake* in the Exchequer Chamber, where the judges thought that, after the rule of law in *Shelley's* case had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule however was only established to the extent in which it was to be found in *Shelley's* case, to this effect; that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument an estate was limited to the heirs of his body, the latter limitation would unite with the former and give him

an

Ante.

Infra.

1 Rep. 104 b.

an estate tail. But it never had been decided, that those words might not be otherwise explained in the will by the testator himself: they were so explained in *Lowe v. Davis*. The estate, which was the subject of dispute in *Lowe v. Davis*, came afterwards to a gentleman, who was not perfectly satisfied with the decision, and would have it canvassed again. His doubts were founded upon an old opinion which he had discovered of Lord *Holt's*; that the words, "heirs of the body," were so positive to give an estate tail to the first taker, that they could not be gotten rid of, by subsequent words. That opinion he had seen; but it was certainly too straight laced a construction; and nobody had ever doubted but that the case of *Lowe v. Davis* was rightly decided. That case however, if it wanted confirmation, had been fortified by the subsequent decision in *Doe v. Laming*. The court there clearly thought that the subsequent words, "as well females as males," shewed that the testator meant the words "heirs of the body," &c. to be words of description of the persons, who he intended should next take, and not to words of limitation: and therefore *Margaret* took only an estate for life.

Mr. Justice *Lawrence* said, the question was whether "heirs male of the body of *Margaret*," was descriptive of the persons, whom the testatrix afterwards called "son or sons:" of the intention there could be no doubt. She first gave *Margaret* an express estate for life, without impeachment of waste; then to trustees to preserve contingent remainders; then, after *Margaret's* decease, to the heirs male of her body to be begotten,

begotten, severally, successively, and in remainder one after another, &c. All this was unnecessary, if the testatrix meant to give *Margaret* an estate tail: but then she went on—"the elder of such sons and the
 " heirs male of his body to be preferred before the
 " younger of such son and sons;" evidently meaning the same persons whom she had before described as heirs male of the body of *Margaret*: therefore this fell directly within the case of *Lowe v. Davis*, and was the same as if the testatrix had said, "by heirs male
 " of the body I mean the eldest son and heirs male of
 " *Margaret*." And if she had said so in as many words, it could not be questioned but that the former words must have had that construction put upon them: now the words made use of were in effect the same. Then the testatrix proceeded to give an estate to the daughters of *Margaret* in the same manner; that also shewed, that by the words, "such son or sons," she meant the same persons whom she had before described as the heirs male of *Margaret*; for she first provided for the sons and then for the daughters of the first taker. It was no answer to say, that by this construction, if the eldest son of *Margaret* had died in the lifetime of the testatrix leaving a son, the devise would have lapsed, and the grandson been disinherited: for, if the obvious meaning of the will was, that *Margaret* should only take for life, they could not enlarge that estate, in order to prevent a possible inconvenience. Judgement was given, that *Margaret* took an estate for life only.

Upon

Upon a writ of error from this judgement to the House of Lords, the following question was put to the Judges—What estate *Margaret Davie* took? and the Lord Chief Baron delivered their unanimous opinion that *Margaret Davie* took an estate for life. Whereupon the judgement was affirmed.

§ 44. In a subsequent case, however, which resembled the last one in several respects, the Judges of the Court of Common Pleas did not think they could restrain the legal effect of the words, “heirs of the body;” so as to convert them into words of purchase.

§ 45. Lands were devised to trustees and their heirs, to the use of them and their heirs, in trust for the use and benefit of the testator’s first son by *Lucy* his wife during his life, and also upon trust to preserve the contingent remainders from being defeated or destroyed; and after his decease to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger and the heirs male of his body; and, for want of such issue, in trust for his second, third, fourth, and all and every other son and sons for their respective lives, with remainders as before; and for want of such issue, in trust for his first daughter, and every other his daughter and daughters, for their several and respective lives; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and, from and after their several deceases, in trust for the several heirs male

Poole v.
Poole, 3
Bos. & Pul.
620.

male of their several and respective bodies lawfully issuing, so as the elder of such daughters and the several heirs male of her body should always be preferred and take before the younger of the same daughters, and the heirs male of her and their bodies; with power to the persons, who should be intitled to the possession of his said estates, to settle jointures: And, as to all the testator's real and personal estate, on failure of such issue by him as aforesaid, and not otherwise, he gave the same to the said trustees and their heirs, to the use of them and their heirs, in trust for *A. P.* for his life; and also upon trust to preserve the contingent remainders therein after limited; and, after his decease, in trust for the first and every other son and sons of the body of the said *A. P.* successively as they should be in priority of birth, and the several heirs of their respective bodies, so as the elder of such sons and the heirs of his body should always be preferred and take before the younger of the said sons, and the heirs of his and their bodies; and, for want of such issue of *A. P.* in the same manner, and for want of such issue to *J. P. M.* and his heirs for ever. The Judges of the Court of Common Pleas certified to the Lord Chancellor, that if the devises contained in the will, to the children of the testator and their issue, had been devises of legal estates, the only son of the testator would have taken an estate in tail male; there not appearing upon the whole will together sufficient indication of the testator's intention to restrain the legal effect of the words, "heirs male of the body," and to convert them into words of purchase.

§ 46. Where words of limitation are superadded to the word “heir,” in the singular number, from which it appears to have been the intention of the testator to denote by the word “heir,” a new stock and root of inheritance, it will be construed a word of purchase; and the first devisee will take an estate for life only.

Where Words of Limitation are added to the Word Heir. Tit. 32. c. 25. f. 31.

§ 47. *Francis Archer*, being seised in fee of land, by his will in writing devised the same to *Robert Archer* the father for his life, and afterwards to the next heir male of *Robert*, and to the heirs males of the body of such next heir male. It was agreed by *Anderfon*, *Walmsley*, and the rest of the court, that *Robert* had but an estate for life; because *Robert* had an express estate for life devised to him, and the remainder was limited to the next heir male of *Robert* in the singular number.

Archer's Case, 1 Rep. 66 b.

§ 48. A man devised land to *R.* his daughter for life; and if she married after his decease and had heir of her body, that then that heir should have it after her death, and the heirs of her body. Adjudged, that the daughter had only an estate for life, and the inheritance was in her heir by purchase, resting in abeyance all her life, and settling at the instant of her death.

Clarke v. Day, Moor. 593.

§ 49. Mr. *Fearne* has observed, that there may possibly be some cases, where the superadded words of limitation may be admitted to controul the preceding words, heirs, heirs male, &c. though in the plural number; when such superadded words limit an estate

Heirs with Words, limiting an Estate of a different Nature. Cont. Rem. 286.

to such heirs, heirs male, &c. of a different nature, from that, which the ancestor would take, if the preceding words "heirs male," &c. in those cases were taken as words of limitation. As in the case, put by *Ander-son*, of a limitation to the use of a man for life, and after his decease to the use of his heirs, and the heirs females of their bodies: here the first word heirs would have given a fee to the ancestor, if taken as a word of limitation; whereas the subsequent words, "and the heirs female of their bodies," grafted on the word "heirs," could give only an estate tail female to the heirs. In such cases, the general effect of the first words, "heirs of the body," &c. seems to be altered, abridged, and qualified, by such subsequent express words of limitation annexed to them, as cannot possibly be satisfied by considering the first words as words of limitation. But we must take care to confine this observation to those cases, where the ingrafted words describe an estate descendible in a different course, and to different persons as special heirs, from what the first would carry the estate to; viz. to males instead of females, or *vice versa*; for, where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems by the general and better opinion, that the annexed words of limitation are not to be attended to, as in the cases of *Goodright v. Pullyn*, *Wright v. Pearson*, and *King v. Burchell*, where the ingrafted words limited the whole fee. Indeed, there does not appear to be the same inconsistency in construing the first words, which describe heirs special, to be words of limitation, where the superadded words extend to heirs

Ante.

Infra.

heirs special ; as there is, where the first words, and those ingrafted on them, distinguish two different incompatible courses of descent, and would not carry the estate to the same persons. In the latter case, it is absolutely impossible, by any implied qualification, to reconcile the superadded words to those preceding them, so as to satisfy both, by construing the first as words of limitation : whereas, in the former case, the superadded words are not contrary to, or incompatible with, the preceding, but in their general sense include them ; and there is no improbability in the supposition, that they were used by the testator in the same qualified sense as the preceding : and then both may be satisfied, by taking the first as words of limitation.

§ 50. Where the remainder is given to the heir of the first devisee, for life only, the first devisee will take no more than an estate for life.

Where the
Remainder is
to the Heir
for Life.

§ 51. *Francis Harvey* devised in these words—“ I give to my son *Frank Mildmay* my farm, called *East House Farm*, &c. to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part if he should marry ; and after his death and jointure, if any be made, to the heirs male of his body lawfully begotten, during the term of his natural life ; and for want of such heir male I give the said farm to my son *Carew Mildmay*,” &c. It was agreed that the limitation to *F. M.* to enjoy and take the profits during his life, and after his decease, to the heirs male of his body, would make an estate tail. So, if

White v.
Collins,
Com. Rep.
289.

Ante.

it had been to the heir male of his body in the singular number, where nothing appeared which explained the intent to the contrary: but here the intention appeared to be that such heir male should have the land only for life, which shewed that the testator did not intend that those words should be taken as words of limitation; and nothing appeared in the nature of the expression, which imported that they should be taken so. Heir male or next heir male were words of purchase, and in this case where the devise was to *F. M.* and after his decease to the heir male of his body during his life, the express limitation during his life shewed that he intended his son should have it in remainder for his life only, and when he devised it over for want of such heir male to *C. M.* this did not import that *C. M.* should not have it till *F. M.* died without heirs male generally, but for want of such heir male who was to have it for life.

Where the
Word "issue"
is used with
Words of
Limitation.
Tit. 32. c. 25.
f. 30.

§ 52. Where an estate is devised to a person for life, with remainder to his issue, with words of limitation superadded, the word "issue" will in that case be construed to be a word of purchase.

Loddington
v. Kyme,
1 Ld. Raym.
203.

§ 53. Sir *Michael Armyn* devised certain lands to *Evers Armyn* for life, and in case he should have any issue male, then to such issue male and his heirs for ever: And, if he should die without issue male, then he devised over. It was agreed by all the judges, that *Evers Armyn* had but an estate for life; and that the issue male of *Evers Armyn*, if there had been any, would have taken a fee by purchase. For, first, they held,

held, that though the word “*issue*” was sometimes construed as heirs, and as a word of limitation, yet, in a devise, it might be a word of purchase as well as of limitation: when it was taken as a word of limitation, it was collective, and signified all the descendants in all generations; but when it was taken as a word of purchase, it might denote a particular person, and be *designatio personæ*. The second question, then, would be, Whether the intention of the testator appeared, that the word “*issue*” should be *designatio personæ*, or whether he designed it to be a word of limitation? And they held, that the testator designed it to be a description of the person; because he added a farther limitation to the issue, *viz.* and to the heirs of such issue for ever.

§ 54. A will was made in these words:— “ To the
 “ intent that all my lands should remain in my name
 “ and blood, I devise to J. S. my near kinsman such
 “ and such lands, &c. to have and to hold for the
 “ term of his natural life only, without impeachment
 “ of waste, then to the issue male of his body lawfully
 “ to be begotten, if God shall bless him with such issue,
 “ remainder to the heirs male of the body of that
 “ issue.”

Backhouse
 v. Wells,
 10 Mod. 181.

Lord Chief Justice *Parker* delivered the opinion of the whole court, that the devisee was made tenant for life, remainder to the issue in tail. The words of the will, he said, were so express to this purpose, that neither any words that could have been used, nor any arguments, could make it plainer. This, he said, was

both the obvious and the legal sense of the words, and what they would have imported in a conveyance.

Doe v. Collis,
4 Term Rep.
394.

§ 55. *J. Newson* devised a moiety of certain lands, after the death of his wife, to his daughter *Susannah*, during the term of her natural life, and, after her decease, to the issue of her body lawfully begotten, and their heirs for ever. *Susannah* had one daughter born before the will was made, and two born after.

Lord *Kenyon* said that, in a will, “issue” was either a word of purchase or of limitation, as would best answer the intention of the devisor; though, in the case of a deed, “*issue*” was universally taken as a word of purchase; therefore, without disputing any of the former cases, but, on the contrary, in confirmation of them all, and relying upon them for the foundation of this judgment, namely, that the intention of the devisor must prevail, he was of opinion, that the devisor, in this case, used “issue” as a word of purchase, and, consequently, that the children of *Susannah* took a fee.

Doe v. Burn-
fall, 6 Term.
Rep. 30.

Unless the
general intent
require a
different Con-
struction.

§ 56. It has been stated in a former chapter (12.) that where a testator appears to have a particular intent, and also a general manifest intent, both of which cannot by any mode of construction be carried into effect, the courts will construe the will in such a manner as to effectuate the general intent; though, by that means, the particular intent is defeated.

§ 57. A person

§ 57. A person devised lands to *A.* for his natural life, and, after his decease, he gave the same to the issue of his body lawfully begotten on a second wife, and, for want of such issue, to *B.* and his heirs for ever; provided that *A.* might make a jointure of all such premises to such second wife. Lord *Hale* was of opinion, that this was an estate tail in *A.*: and, though the three other judges in *B. R.* were of a contrary opinion, yet upon error brought in the Exchequer Chamber, the judgment was reversed, and Lord *Hale's* opinion established.

King v. Mel-
ling, 1 Vent.
225 232.
2 Lev. 58.
2 P. Wms.
472.

§ 58. *John Blount* devised a messuage and farm unto his cousin *John Harris*, to hold during his natural life; and, from and immediately after the determination of that estate, unto the issue male of the body of his cousin *John Harris* lawfully to be begotten, and to his and their heirs, share and share alike, if more than one; and for want of such issue, unto the issue female of his cousin *John Harris*, and to her and their heirs, share and share alike, if more than one; and, for want of such issue, unto his cousin *William King*, his heirs and assigns for ever. And, taking notice that he had covenanted to settle 50 *l.* a year upon his wife, in part performance thereof, he devised houses, &c. at *Maidstone* to her, to hold for her life, as part of her jointure; and, from and immediately after her death, he gave the same to his cousin *John Harris*, for and during the term of his natural life; and, from and immediately after the determination of that estate, unto the issue male of the body of the said *John Harris* lawfully to be begotten, and to his and their heirs; and, for

King v.
Burchall,
4 Term Rep.
296.
Note (d.)

want of such issue, to his cousin *William King* and his heirs; with a proviso, that if *John Harris* or his issue should alienate the premises, he should pay 2000 *l.* to the person who ought next to take by virtue of the devises aforefaid.

Lord Keeper *Henley*.—The first question made by the plaintiff's counsel was, Whether *Harris* took under this will an estate for life only, or an estate tail? And they founded their arguments of its being an estate for life, on the the word “*issue*” being technically a word of purchase, and on the superadded words of limitation: and they compared this case to *Loddington* and *Kyme* amongst many other cases. The true answer is, that there can be no technical words in a will; but they are to be construed according to the intention of the parties. 2dly, This case has no resemblance to *Loddington* and *Kyme*: that was expressly upon two contingencies, to *A.* for life, and if *A.* have issue, then to such issue in fee; and if he die without issue, then to *B.* in fee. There the court construed the word “*issue*” to be *nomen singulare*; and were well warranted in so doing by the intent of the party. But, here, it is and must be plural: and, if the issue were to take as purchasers, they must take as tenants in common: and put the case, that *J. Harris* had ten sons, and the nine eldest died in his lifetime, leaving children, yet the tenth and only surviving son would carry away the whole inheritance. The testator intended the word “*issue*” to be a word of limitation in this case, and that *W. King* should take on failure of issue by *J. Harris*, whenever that should happen, and
has

has carried the whole fee in [particular estates and remainders for want of such issue, *i. e.* for default of such issue. There is something of peculiar force in this expression : and the law supposes that the inheritance already attached in the first taker, but liable to be defeated by a subsequent event, his dying without issue ; and by no rule of law can it admit of that narrow rule of construction put on it by the plaintiff's counsel, *viz.* of being confined to issue living at *J. Harris's* death. They say, that if it be construed to be an estate tail in *J. Harris*, the superadded words of limitation to the word "*issue*" must be rejected as nugatory. I agree it is a sound rule in the construction of deeds and wills, that every word ought to stand, if consistent with the manifest intention. Therefore, in *Backhouse and Wells*, the limitation being to *A.* for life only, and, after his decease, to his issue, if God should bless him with any, the court, first on account of the negative word "*only*," secondly, because the word "*issue*" was so collected, as to be construed *nomen singulare*, held it a word of purchase. So, in *Sharw* and *Wcigh*, and the word "*heir*" in *Maggot* and *Sewell*. But, where there is an evident necessity to make it plural, there the same necessity requires that the superadded words of limitation should be rejected : and there is no case or authority to shew that the word "*issue*," or "*heirs*," when plural, has been construed a word of purchase ; but, on the other hand, there are authorities, where the word "*heir*" in the singular number has been so ; and so may the word "*issue*," where the context requires it to be taken as a word of purchase. 4thly, The testator, by the proviso

Ante l. 54.

Infra.

vifo in his will, has plainly declared his intention to give *J. Harris* an estate tail, “if *J. Harris*, or any of “his issue, should alienate,” &c. How could *J. Harris* alienate or incumber, if he had no estate of inheritance? The case of *Wright* and *Pearson* determined by me, *T. 31 G. 2.* has been attended to by the counsel in this case: and, in my opinion, that was a much stronger case than the present. That was of a trust estate, and there were trustees interposed to preserve, &c.; and I was strongly pressed with the authority of *Bagshaw* and *Spencer*: yet, after the best consideration I was able to give it, and after ransacking all the cases on the subject, I held it an estate tail; and an appeal was afterwards brought in the House of Lords against that decree, but was afterwards deserted by the appellant, on advising with his counsel. That determination, though a decree of my own, will have considerable weight with me: and I find, upon viewing my notes in that case, that the present has been argued upon the very same principles. I am, therefore, of opinion, for the reasons before mentioned, and from the authorities cited, that *John Harris* took an estate in tail male.

Roe ex dem.
Dodson v.
Grew,
Wilm. 272.
2 Will. Rep.
322.

§ 59. *Daniel Dodson* devised in these words:—“I give unto my nephew *George Grew* all, &c. to hold for and during the term of his natural life; and, from and after his decease, to the use of the issue male of his body lawfully begotten, and the heirs male of the body of such issue male; and, for want of such issue male, he gave the aforesaid premises to his nephew, *George Dodson*, his heirs and assigns for ever.” *George Grew* had

had no child at the time of making the will : he entered on the premises, suffered a recovery thereof, and died without issue male. The question was, whether *George Grew* took an estate tail, or for life only, under the said will ?

Lord Chief Justice *Wilmot* said, that though the testator certainly intended, in the first instance, to give *George Grew* only an estate for life, yet, if he as certainly intended that all his sons should take in succession one after another, (and they could not take in that manner, but by lodging the estate tail in *George Grew*), then it came to this case : here were two things intended ; one an estate for life to *G. Grew*, another an estate in succession to all his sons in tail male, *ad infinitum*. Could they both take place ? If they could, they ought : if they could not, then balance the two intentions against one another, and see which was the weightiest and most comprehensive ; and give that effect. Courts substitute themselves in the place of a testator ; and, suppose the question to have been asked him, you have willed two things, which cannot both be obeyed exactly according to your will, and, therefore, one must yield to the other : what must have been the answer ? “ I wish to be obliged in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one.” There were three points to be considered ; 1st, If he intended a successive inheritance to all the issue male of *G. Grew ad infinitum* ? 2d, Whether that intention could take place, if *G. Grew* have only an estate for life ? 3d, If it could not, then, which
of

of the two intentions must govern the construction? That is, if the words "*for life*" must give place, or the words, expressing an intention of giving a successive inheritance to the issue male of *G. Grew*. As to the first point, the will was clear: the remainder to *Dobson* was not to take place while any issue male of *G. Grew* existed: a general failure of that line was to open the succession to *Dodson*; and, therefore, a construction to let him in sooner, would directly encounter the manifest intention of the testator, who was making each of his nephews the distinct root of succession, to particular parts of his estate. It was objected, that the word "*issue*" was only descriptive of an individual, and the words, "of the body of such issue male," was in the singular number. Issue, in its natural or ordinary signification, meant "all:" it might be restrained. If first, next, or any other similar words had been used, he might have confined its general meaning; but, as it stood in the will, it comprehended all. The word "*body*," in the singular number, was not meant to point out one individual, *viz.* the first issue, and to exclude all the rest; but to limit the operation of the devise to one at a time, in a course of succession, and to exclude the issue from taking all together, which might have been more doubtful, if the word had been in the plural number, "*bodies*:" but, without express words, the court would not make an exposition productive of such absurd consequences. If only one son, it must be the first: the existence of a son for a moment determined the limitation: and, if ten more sons had been born after, they could not take, but the remainder limited to *G. Dodson* was to fall

fall into possession, in direct opposition to the will, which said, it should take place for want of "such issue male:"—*such*; What? Issue male of the body of *G. Grew*, comprising and embracing every branch arising from him: not one, but all the male line derived from him.

It was also objected, that "issue" was more properly a word of purchase. It was used in the statute *De Donis* without an idea of purchase annexed to it, and it acts in a double capacity, as will best answer the intention: and though it was substituted in the place of the word "*heirs*," which was scratched out, and it was fairly argued he might intend it as a word of purchase, yet it did not carry the argument a jot farther than the words, "*for life*" did: for, if they took by purchase, they must all take as joint-tenants for life, and tenants in common of the inheritance. Could that be his intention? For if he had ten sons, and nine left issue, the tenth must have the whole estate by survivorship; and when all were dead, then the estate must break into ten parts, and there could be no cross-remainders; so that, when there was a failure of issue of one son, that part must go over to *Dodson*, when no part was intended to him whilst there was any issue male of the body of *G. Grew*. He intended all to take, but in a course of succession.

2dly, Could this intention take place, if *G. Grew*, took only an estate for life? It might, by construing the word "*issue*" to mean first and every other son in succession. Suppose he had said, "I mean by issue,
" first

“first and every other son,” it must have been so expounded; because words were only pictures of ideas upon paper, and, therefore, if he put a meaning on the word himself, it must be understood as he meant it. But he had not said so; and, therefore, he left the word to act in its own natural character, and, in that case, it would not endure to be expounded “first and every other son in succession:” for, *ex vi termini*, it meant all, and had not an eye of successive priority in it; and there was no case, where it was ever construed to mean “first and every other son in succession,” and to create a series of contingent remainders one after another; which it must do, or the principal intention of the testator be disappointed; and when it is descriptive of the estate, and operates as a word of limitation, and gives an estate tail, it is not the “word,” but the “law,” which regulates the descent to all the sons successively, upon its own favourite principles of primogeniture. It had been argued that, if we could collect from the will, that he meant first and every other son in succession, why not construe it so, and thereby complete every part of the intention? Because it would be doing violence to the word “issue,” and forcing it out of its known established sense, when the meaning of the testator might be as effectually complied with by giving it one of its natural energies, as a word of limitation: and though the intention, collected from the will, was to govern the construction, yet there must be words used which are fit and proper for that purpose. It would confound the use of all language, and introduce the greatest barbarity and confusion, to make words stand for ideas,

in opposition to the sense which usage had put upon them: and, as a word of limitation, it did not defeat the estate for life; for, without fine or recovery, which was not to be presumed, an estate tail was only an estate for life.

As to whether the words, "heirs male of the body of *A.*" operating as words of purchase, would have the same effect, and take in all the issue male of *A.* as effectually, as if they operated as words of limitation, he admitted, upon the authority of *Co. Lit.* 26 *b.* and the case of *Southcote v. Stowell*, 1 *Mod.* 226. 237. and *Freeman's Reports* 216. 225., that when an estate once vests in an heir male of the body of *A.* by purchase, that any other heir male of the body of *A.* may take by descent; and the reason seemed to be, because it is *quasi* an estate tail from *A.*; and the will of the donor gave it a descendible quality, after it is once vested, as to all the lineal male descendants from *A.*, as well as to all the lineal male descendants of the first purchaser. But still it would not have the same consequence, as if they acted as words of limitation: for, suppose *A.* had a son who died in his father's lifetime, leaving daughters, and *A.* had other sons, they could never take at all, for the second brother could not take because he was not complete heir; whereas, if it was an estate tail, it would descend upon the second son, and take in all the descendants: and it was impossible to make it equivalent to a limitation to the first and every other son, without violating and confounding the legal operation of words, and producing consequences not warranted by the will: for, upon a limitation to the first

and

Vide Tit. 32.
c. 24. f. 36.

and every other son, the remainders would vest the instant the sons were born; and, when a son was of age, he might by a fine bar all his issue: but, where the limitation was “to the heir male of the body of “*A.*,” no estate vested till *A.* died; and, if there were no trustees to preserve, &c. *A.* might bar the remainders at any time after the sons were born, as well as before: and a fine levied by his eldest son would not bar his issue, if he died before the father, because the issue would take by purchase, and not from his father.

3dly, Which intention ought to take place? If the testator had put the issue and remainder-men into the power of *G. Grew*, it was not to be presumed he would defeat them. If he had given contingent remainders to the issue, and they were to take by purchase, he might defeat the issue before they were born. If estate tail,—a chance; if confined to one issue only, the rest had no chance; better to have a chance of something; the remainder was of no estimation after estate tail, vested or contingent, *quâcunque viâ*. But suppose the question asked,—“You meant a strict settlement, with “trustees to preserve contingent remainders; but the “words will not warrant the expounding the will in “that manner. *G. Grew* must either take an estate tail, “which will let in all his issue male, but with a power “of defeating them and *George Dodson*, or an estate “for life, which will let in *G. Dodson*, in exclusion of “the sons of *G. Grew*? His answer must have been; “I do not intend *G. Dodson* any thing, whilst there is “issue male of *George Grew*.”

It was certainly the intention of the testator, that *G. Grew's* sons should take in succession, which they could not do, if he was only tenant for life. He, therefore, took an estate tail. The other Judges concurred; and judgment was given accordingly.

§ 60. The Court of Chancery has deviated from the rule in *Shelley's* case in some cases, where the testator has directed a settlement to be made, and the court has been called upon to give directions respecting such settlement, and so far has departed from that which would be the legal operation of the words limiting the trust, if reduced to a common law conveyance, as to construe the words “heirs of the body,” although preceded by a limitation for life, as words of purchase, and not of limitation. But this has been done only in cases, wherein it appeared from some clause or circumstance, essentially repugnant to the nature of an estate tail, that the deviser could only intend to give the first devisee an estate for life; and that he used the words, “*heirs of the body*,” for the purpose of describing the persons, to whom he meant to give the estate, after the death of the first devisee.

Where a Trust is created, and a Conveyance directed.

§ 61. The Countess of *Sheppey* devised her real and personal estate to trustees and their heirs, for payment of debts and legacies; and afterwards to settle the remainder, and what should remain unfold, a moiety to her son *Henry* and the heirs of his body by a second wife, and, in default of such issue, to her son *Francis* and the heirs of his body; the other moiety to her son *Francis* and the heirs of his body, with remainders over, taking special care in such settlement, that it should never be

Leonard v. Earl of Suffex, 2 Vern. 526.

in the power of either of her said sons, to dock the intails of either of the said moieties given to them as aforesaid, during their or either of their life or lives. The question was, whether *Francis* and *Henry* were entitled to have an estate tail conveyed to them, or only an estate for life.

Lord *Cowper* decreed, that the sons must be made only tenants for life, and should not have an estate tail conveyed to them; but their estate for life should be without impeachment of waste. And, first, because here, an estate was not executed, but only executory; and, therefore, the intent and meaning of the testatrix was to be pursued. She had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have, if an estate tail was to be conveyed to them; and took it to be as strong in the case of an executory devise for the benefit of the issue, as if the like provision had been contained in marriage articles.

Stamford
(Earl of)
v. Hobart,
3 Bro. Parl.
Ca 31.

§ 62. Sir *John Maynard* devised certain estates to trustees, and their heirs; then followed this clause.—
 “ My will is, that my said trustees and their heirs con-
 “ vey the said manors of *Clifton* and *Hardmead* to the
 “ use of, or in trust for *Sir Henry Hobart* and *Eliza-*
 “ *beth* his wife, for their lives, and the life of the
 “ longer liver of them; the remainder to the first son
 “ of the said *Elizabeth*, for 99 years, if he shall so
 “ long live; the remainder to the heirs male of the
 “ body of such first son; the remainder to all and
 “ every the sons of the said *Elizabeth* for 99 years,
 “ if

“ if every such son respectively shall so long live ; the
 “ remainder to the heirs male of every of them, to take
 “ not jointly, but successively, the one after the other,
 “ according to the births of each of them ; the sons
 “ to take the term of 99 years with immediate remain-
 “ ders to their said heirs males ; the remainder thereof
 “ to *Mary Maynard,*” &c. Sir *John Hobart*, the
 only son of Sir *H.* and Lady *Hobart*, exhibited his
 bill against the trustees, praying that they might con-
 vey the estates according to the will, which was de-
 creed : and a conveyance was settled by the Master,
 whereby the estate was mentioned to be conveyed to
Thomas Carter and *Charles Clayton*, and their heirs,
habendum to them and their heirs ; *to the several uses,*
intents, and purposes in the said will and act of parlia-
ment limited, expressed, and declared ; and to and for no
ether use, intent, and purpose whatsoever.

To the Master's report of this draft the plaintiff ex-
 cepted : for that the premises ought at least to be li-
 mited *to the use* of the said *Carter* and *Clayton* and their
 heirs, and *only in trust for* such person and persons,
 and such estate and estates, as were in and by the said
 will limited, whereby the legal estate might be vested
 in the said trustees, *for the better preservation* of the
 contingent limitations ; which otherwise, as the draft
 was prepared, were liable to be destroyed, and the
 testator's intention plainly to be defeated.

The matter of this exception came on to be heard
 before the Lord Chancellor, on the 19th of *December*
 1709 ; when his Lordship declared, “ That in mat-

“ ters executory, as in case of articles, or a will di-
 “ recting a conveyance, where the words of the arti-
 “ cles or will were improper, that court would not
 “ direct a conveyance, according to such improper or
 “ informal expressions in the articles or will, but would
 “ order the conveyance or settlement to be made in a
 “ proper and legal manner, so as might best answer
 “ the intention of the parties : and, in this case, his
 “ Lordship conceived the true intent and meaning of
 “ the will to be, *that the estates should be secured, as*
 “ *far as the rules of law would admit, to the issue male*
 “ *of the respective devisees, before the cross-remainders*
 “ *should take place ;* and that it was designed to be as
 “ strict a settlement as possible by law.” His Lord-
 ship, therefore, decreed, that in the said conveyance,
 where any part of the estate was limited in use to the
 plaintiff for 99 years, if he should so long live, *there*
should be a limitation over to trustees and their heirs,
during his life, to preserve the contingent uses in remain-
der ; and then to the first and other sons of the plain-
 tiff in tail male successively : and, where any part was
 limited to the defendant the Countess of *Stamford* for
 life, and then to the Earl for 99 years if he should so
 long live, that there should also be a limitation over
 to trustees and their heirs, during the lives of the said
 Earl and Countess, and the survivor of them, to pre-
 serve the contingent uses in remainder ; and then to
 the first and every other son of the Countess of *Stam-*
ford, and the heirs male of the body of such first and
 every other son ; and then to the right heirs of Sir
John Maynard.

From this decree, the defendants, the Earl and Countess of *Stamford*, appealed to the House of Lords; by whom it was affirmed, and the appeal dismissed.

§ 63. In the case of *Papillon v. Voice*, the sum of *Ante.*
10,000 *l.* was devised to trustees, to be laid out in a purchase of lands, to be settled in the same manner as land, which the testator devised by the same will; that is to say, to *B.* for life, without impeachment of waste, and, from and after the determination of that estate, to trustees and their heirs during the life of *B.*, to preserve contingent remainders; remainder to the heirs of the body of *B.*, with remainder over, with a power to *B.* to settle a jointure. And it has been stated that, as to the lands devised, Lord *King* held that *B.* took an estate tail. But, as to the other point, he declared the court had a power over the money, directed by the will to be invested in land; that the diversity was, where the will passes a legal estate, and where it is only executory, and the party must come to this court in order to have the benefit of the will: that, in the latter case, the intention should take place, and not the rules of law; so that, as to the lands to be purchased, they should not be limited to *B.* for life, with power, &c. remainder to the heirs of his body, but to *B.* for life, with power, &c. remainder to trustees during his life to preserve contingent remainders; remainder to his first and every other son in tail male, remainder over, &c.

§ 64. *Joseph Ashton*, by his will, gave 1200 *l.* in money, and 6000 *l.* *South Sea* annuities, in trust as

Ashton v. Ashton,
Collect. Jur.
V. 1. 402.

soon as conveniently might be after his death to sell the same, and lay out the money in a purchase of lands of inheritance, to be conveyed to *George Joseph Ashton* for life, and, after his death, to the issue of his body lawfully begotten; and for want of such issue, to *Henry Ashton* in fee. *George Joseph Ashton* brought his bill for a performance of this trust; and at the hearing of the cause, one question was, what estate the plaintiff ought to take in the lands to be purchased, whether for life only, or in tail? it being insisted on his part, that, had this been a devise of the lands, he would clearly have been tenant in tail, and the trust ought to receive the same construction. But the court held he ought to be made tenant for life only of the lands to be purchased, and decreed, that they should be conveyed to the plaintiff for life, with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons in tail general; with remainder to his daughters in tail as tenants in common, and not as joint tenants, with cross-remainders between them; remainder in fee to the defendant *Robert Ashton*.

Glenorchy v. Bosville,
Forrest. 3.
Collect. Jur.
V. 1. 405.

§ 65. Sir *Thomas Pershall* devised all his real estate to trustees, upon trust to convey the same to the use of his Niece *Arabella* (who afterwards became Lady *Glenorchy*) for life, without impeachment of waste, voluntary waste in houses excepted, remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over.

This case came on first before Lord *King* who took time to advise, and to have the opinion of the Judges.

It afterwards came on before Lord *Talbot*, who, after long argument and deliberate consideration, held, that Lady *Glenorchy* was entitled only to an estate for life, with remainder to her husband for life, remainder to trustees to preserve contingent remainders, remainder to her first and other sons in tail, remainder to her daughters in tail; and decreed a settlement accordingly.

§ 66. *Abraham Meure* devised all his lands to trustees and their heirs, in trust to sell the same, and, with the money arising by the sale, to purchase other freehold lands or long annuities, or stock, and then in trust to permit the plaintiff and his assigns to receive the interest and profits thereof during his life, and, after his decease, then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and, in default of such issue, the testator devised the principal and interest arising by sale of his said estate to another.

Meure v. Meure,
2 Atk. 265.

The Master of the Rolls (Sir *Joseph Jekyll*) said,—The principal question was, whether an estate tail was to be limited to the plaintiff, or an estate for life only? He observed, that the case of *Glenorchy v. Bosville* was in point, and he should decree accordingly.

§ 67. In the case of *Austen v. Taylor*, Lord Keeper said it had been argued that the devise created an executory trust; but that these words had no certain signification. In *Papillon v. Voice*, Lord King called that an executory trust, where the party was obliged

Ante.

Amb. 377.

to come to this court, for an execution of the trust. But it was the same in every case of a trust ; and the determination must be the same in all cases, that is, according to the intent. *Papillon v. Voice* was a sound determination. In the case of marriage, when there were only heads of settlement, which the trustees were to make, the court could not decree otherwise than an estate for life in the first taker, with contingent remainders. An estate tail in the first taker would be no settlement at all. So in *Leonard v. Earl of Suffex*, the distinction seemed to be, where the testator had directed the trusts, and where something was left and referred to the trustees to be done, as in *Lord Glenorchy v. Bosville*. He was of opinion, that in the case of imperfect trusts only, the court could make a different construction from a legal limitation. In the present case there was no reference to the trustees ; without that ingredient he did not find any case, where the court had given a different meaning from what a court of law would on a legal limitation. Nothing was left to the trustees to be done, but to buy the land ; the testator had declared the uses of the land when purchased. His Lordship did not believe the testator intended the trustees should make a conveyance. It was said, if the words in the former limitation had been again repeated, it would have been the very case of *Papillon v. Voice* ; but he thought otherwise. There was a direction in that case to the trustees to convey and settle ; but there was no direction here. The true guide was this : where the assistance of trustees, which was ultimately the assistance of this court, was prayed in aid to complete a limitation, in that case the limitation in
the

the will not being complete, it was a sufficient declaration of the testator's intention, that the court should model the limitations; but, where the trusts and limitations were expressly declared, the court had no authority to interfere, and make them different from what they would be at law.*

§ 68. *Thomas White* gave all his personal estate to trustees, upon trust to lay out the same in land, to be settled and assured as counsel should advise, unto and upon the said trustees and their heirs—"Upon trust to and for the use of the plaintiff and the heirs male of his body, to take in succession and priority of birth; and, for default of such issue male, then upon further trust, and to and for the use of his niece *Ann Robertson*." in the same manner. Upon a bill for performance of the trusts, the question was, whether the lands to be purchased should be settled on the plaintiff as tenant in tail, or in strict settlement upon him for life, with remainder to his first and other sons in tail male?—Lord *Northington*, upon the hearing, directed the settlement to be made on the plaintiff for life, with limitations to his first and other sons in tail male. The cause was re-heard before Lord *Campden*, who was clearly of opinion to affirm the decree; and took a distinction between the case, where a testator has given complete directions for settling his estate, with perfect limitations, and where his directions are incomplete, and are rather minutes or instruc-

White v. Carter,
Amb. 67a,

* Mr. *Ambler* has observed that the above opinion was very satisfactory to the bar in general.

tions, and cannot be performed in the words of the will. In the former case the legal expression shall have the legal effect, though perhaps contrary to his intention; as in *Garth v. Baldwin*. In the latter case, the court will consider the intention, and direct the conveyance according to it. Here the intention was very plain; he directs the settlement to be made by advice of counsel, and in succession, and priority. He meant something different from an estate tail, when he wanted the assistance of counsel; and though the words, “in succession and priority,” might have effect in case the plaintiff took an estate tail, yet they were meant to give an interest to the sons after the death of the plaintiff; the latter clause put it out of doubt; he there explained his meaning, by making use of the words, “sons and issue.”

Where the
Estates are
of different
Natures.

§ 69. Where the estate, devised to the ancestor, is merely an equitable or trust estate, and that to his heirs, or the heirs of his body, carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as would have been the case, if both had been of one quality, that is, both legal, or both equitable.

Ld. Say and
Sele v. Jones,
3 Bro. Parl.
Ca. 113.
8 Vin. Ab.
262.

§ 70. Mrs. *Ellis* devised her estates to trustees and their heirs; upon trust to pay debts, legacies, and annuities, and to pay the residue to the proper hand of her daughter *Cecil Fiennes* (who was then married) for and during the term of her natural life. And, from and after her decease, the said trustees should stand and be seised of and in all the said manors, &c. to the use and behoof

behoof of the heirs of her said daughter *Cecil Fiennes*, severally and successively, as they should happen to be in priority of birth and seniority of age, and to the heirs of their several and respective bodies in tail general; and the question was, whether *Cecil Fiennes* had an estate tail, or only an estate for life.

Lord *King* was of opinion that, by the words of the will, the use was executed in the trustees and their heirs, during the life of *Cecil Fiennes*; and she had only a trust in the surplus of the rents and profits. But by the subsequent words, *viz.* “that the trustees should stand seised to the use of the heirs of the body of *Cecil Fiennes*,” &c. the use was executed in the persons intitled to take by virtue thereof; and therefore, there being only a trust estate in the ancestor, and an use executed in the heirs of her body, those different interests could not unite, so as to create an estate tail by operation of law in the ancestor. And, upon an appeal to the House of Lords, the decree was affirmed.

Tit. 12. c. 1.
f. 22.

§ 71. Lands were devised to trustees, upon trust that they should every year, after deducting rates, taxes, &c. pay such clear sum as should remain to *A. B.* during his natural life, and after his decease to the use and behoof of the heirs male of the said *A. B.* lawfully begotten, as they should be in priority of birth, and in default of such issue remainder over. Lord *Thurlow* was of opinion that *A. B.* had only an equitable estate for life; and, the subsequent estate being executed, he had a legal remainder in tail, which

Shapland v.
Smith,
1 Bro. Rep.
75.

Tit. 12. c. 1.
f. 17.

could not unite; and therefore the devisee had only an estate for life.

Tit. 12. c. 1.
f. 18.

§ 72. In the case of *Silvester v. Wilson*, which has been stated in a preceding title, where a person devised lands to trustees and their heirs, upon trust to take and receive the rents, issues, and profits thereof, and to apply the same for the subsistence and maintenance of his son during his life, and immediately from and after the decease of his son, then the testator gave and devised the said premises unto the heirs of the body of his said son. It was held that as the estate devised to the son for his life was merely an equitable one, and the remainder to the heirs of the body of the son was a legal one, the son only took an estate for life.

Case of Perrin
v. Blake.
Col. Jur.
Vol. 1. 283.

§ 73. Thus stood the doctrine respecting the application of the rule in *Shelley's* case, in the construction of wills; when the case of *Perrin v. Blake* arose upon a devise made in the following words—“ And should
“ my wife be enſient with child at any time hereafter,
“ and it be a female, I give and bequeath unto her
“ the ſum of 2000*l.* current money of this iſland, and
“ to be paid her when ſhe attains the age of twenty-
“ one years, or day of marriage, which ſhall firſt
“ happen; and to be generally educated and main-
“ tained out of my eſtate, till her portion becomes
“ payable, without any deduction of the ſame or any
“ part thereof. And, if it be a male, I give and be-
“ queath my eſtate both real and perſonal, equally to
“ be divided between the ſaid infant and my ſon *John*
“ *Williams*, when the ſaid infant ſhall attain the age
of

“ of twenty-one. *Item*, and it is my intent and
 “ meaning, that none of my children should sell and
 “ dispose of my estate for longer time than his life :
 “ and to that intent I give, devise, and bequeath, all the
 “ rest and residue of my estate to my son *John Williams*,
 “ and the said infant, for and during the term of their
 “ natural lives, the remainder to my brother-in-law
 “ *Isaac Gale* and his heirs, for and during the natural
 “ lives of my said sons *John Williams* and the said
 “ infant ; the remainder to the heirs of the bodies of
 “ my said sons *John Williams* and the said infant,
 “ lawfully begotten, or to be begotten ; the remain-
 “ der to my daughters, for and during the term
 “ of their natural lives, equally to be divided between
 “ them, the remainder to my said brother-in-law,
 “ *Isaac Gale* and his heirs, during the natural lives of
 “ my said daughters respectively ; the remainder to
 “ the heirs of the bodies of my said daughters, equally
 “ to be divided between them.”

The testator died, leaving the said *John Williams*, his only son and heir, and three daughters. The testator's wife was not enſient at his death ; and *Isaac Gale*, the devisee in trust in the will, died before the testator.

This case was argued in the Court of King's Bench in *Easter* Term 9 *Geo.* 3. and in the *Trinity* Term following, and in *Hilary* Term 10 *Geo.* 3. the Judges delivered their opinions *seriatim*.

Mr. Justice *Willes* said there were two questions—
 1st, What appeared to be the intention of the testator?
 2d, Was that agreeable to the rules of law? The in-
 tention

tention was apparent from the introductory clause which governed the whole will. The devise to *Isaac Gale* was a farther proof of the intent; from every part of the will it appeared that *Gale* was meant as a trustee to preserve contingent remainders: After the devise to *Gale* he gives it to the heirs of the body of his son. If he could give an estate for life to one, and the inheritance to the heirs of the body of the first devisee, and if his intention appeared to be so, he should think that that intention must control the legal sense of the words, heirs of the body. The rule contended for which was in *Shelley's* case; was pronounced by Lord *Coke* upon a deed, and in argument; and though he should be for adhering to it in every case literally within it, yet it must not be extended an inch: The maxim itself grew with feudal policy, and the reasons of it were antiquated. The logicians say, *cessante causâ, cessât effectus*, and surely the lawyer may say—I will confine an old rule within its exact bounds, and extend it as little as possible. Having then stated many of the preceding cases he concluded that the intention of the testator must prevail, which being to give an estate for life only to *John Williams*, in his opinion he took such an estate only.

Mr. Justice *Aston* said they were now examining a testator's will, and deciding upon the devises in that will. The first and fundamental rule of law in point was, that the intention of the testator was to be collected and allowed though not expressed in any legal language. The intention was clearly to give an estate for life, and where the intention is clear it should govern. But it was objected, first, that in *Shelley's* case

it is laid down—That if the ancestor takes for life, and in the same instrument an inheritance be limited to the heirs of his body, the first takes the estate tail. Secondly, That the testator had made such a devise in the very words in this case; that no words of limitation were superadded to the words devising the inheritance: That the devise was of a legal estate, not of a trust, and therefore that the legal sense of the words would supervene the intention, however plainly expressed. As to the first he admitted the rule in *Shelley's* case to be law, but he denied the consequence, that it was an invariable rule to be applied on every devise. It was an old rule of feudal policy, the reason of which was long since antiquated, and therefore it must not be extended one jot.

The word *heirs* was a term of art, it was necessary to be used in a deed but not in a will. So in the case of estates tail; in a deed they must be created by using words of procreation, as, heirs of the body. But *proli, femini*, issue or children would do in a will; from whence it followed that a testator need not use terms of art. The argument now was, since he had used them, they must have their due influence. But it was no conclusive argument; when the law permitted an intention to be freely communicated, no reason could be given why terms of art should not be got over. Sir *Joseph Jekyll* in *Papillon v. Voyce* said, the intention if lawful shall govern. Lord *Talbot* observed in *Glenorchy v. Bosville*,—The rule of law is not so strict, as to controul the intent. In *Sayer v. Masterman* Lord Commissioner *Willes* observed that the intention

intention should always govern; and that case was determined on the non-appearance of intent. Lord Keeper *Henley* concurred in this opinion, observing that such was not an arbitrary opinion, but consonant to justice and reason; that if the intent appeared, the testator need not be tied down to legal construction. As to superadded words of limitation, upon the words devising the inheritance, whether singular or plural, they were immaterial, the true ground of enquiry being the intention.

The next argument was, that it was not a trust, but a legal devise. He saw no grounds for the distinction between trusts and legal estates, nor did he think it established. It was laid down in several cases, that courts of law must decide upon intent, as well as courts of equity. Courts of equity had frequently upon trusts, decreed estates tail, and this upon a very substantial ground, because the intent of the parties had not been sufficiently explained to contravene the legal operation of the words.

Lastly, the words restraining in the introductory clause signified nothing, the whole clause was explanatory of intention, which was consistent with the devises in the other parts of the will. And to shew this the case of *Leonard v. The Earl of Suffex*, was a respectable authority: there an estate tail was actually devised, and the restrictive clause that the son should not alien, was holden only as explanatory. So in the present case, the clause restraining the power of alienation in the first place, could not, in strict lan-

guage be called a restraint on the tenant in tail; and as it was in a will, it must be expounded only as indicating the intention: and therefore upon the whole of the case he thought that the son *John Williams* took only an estate for life.

Mr. Justice *Nates* said, he allowed that upon the construction of a will free scope was to be given to the intention; it was to be collected from various parts, and the whole scheme and design were to indicate the intention: but the intention must be manifestly clear, and likewise fully consistent with every rule of law. There were cases to be met with, even of trusts, where the testator had holden forth strong marks of his intention, and yet because the legal words which he had used bore in legal language a contrary import, the intention gave way to the superior influence of law. After you have fixed the intention, it then becomes a question whether such intention can be executed, consistently with the established rules of law, if it cannot we had better adhere to the law, and let a thousand testator's wills be overthrown. In considering the question it was necessary to fix the point. This was a devise of a real estate to *John Williams*, &c. here was no trust executory, no future conveyance to be made, every thing depended on the limitations in the will itself. It was an axiom in our law, that wills were to be construed according to the intention. This axiom was used at the bar in the fullest sense, and it was said, that the intention of the testator, if legal, should be carried into execution, and allowed, in whatsoever words he

should have explained such intention. But he could not accede to so unbounded a position; he agreed that in the case of an executory trust it was so: and this out of humanity to the ignorance of a testator, because in this case no rule of law would be violated: but in the case of a legal devise he conceived the allowing so much favour would overthrow the established law, and endanger property considerably.

In giving his sentiments upon this question he should endeavour to maintain two propositions, First, that in every devise of a legal estate the construction should be agreeable to the legal rules of construction.

Secondly, That the rule laid down in *Shelley's* case was one of them.

If he should prove successful in these propositions it would immediately follow that *John Williams* was tenant in tail.

The rule of law mentioned by several writers was this: a will shall be construed so as to fulfil the intention of the testator, so far as it is consistent with the rules of law. And this was as necessary to the safety and certainty of the rules of property, as not allowing a testator to do that which was illegal; these established rules of construction formed the barriers which kept off uncertainty and vexatious litigations of disputed titles; and this certainty so desirable could no longer exist than whilst the courts adhered to established rules of construction.

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The favour then shewn to a will was this; that barbarous words should be supplied; if the devises were imperfect a necessary implication should be allowed; but if the limitations were perfect, there was no occasion for assistance, and the expressions used must have their legal effect. These technical expressions were the measures of property in legal devises; and the law having fixed a determinate meaning to them, will not permit their sense to be perverted, but directs the judges ever to adhere to them without the smallest departure.

Secondly, That the rule in *Shelley's* case was one of the rules of construction, it had its origin in the feudal policy, and grew up in days when the law favoured descents as much as possible. He admitted that the original reason of it had long since ceased, but he denied that for that reason it must be discountenanced, it having long been the law of the land, and it must continue such till Parliament should interpose. But independent of the feudal law, the rule was reasonable and just, and was applicable to a will, as well as to a deed.

Many arguments were used at the bar to shew that this will was not within the meaning of the rule in *Shelley's* case; and the words being different required a different rule of construction. The rule did not speak the word heirs abstractedly, it did not mean to insinuate that there was any magic in the word heirs; it only speaks of the two limitations. To one for life, to his heirs the inheritance. The first gives an estate

of freehold, the second gives the inheritance. The freehold was merged in the inheritance, and the ancestor took the whole estate devised.

He then came to the second head of argument, to examine what difference the words made which were used by the testator in the present case.

First the preliminary clause.—It was not difficult to shew that the restriction in this clause was void; it was tantamount to saying, “My son shall not convey a greater interest than for life,” and he went on to give him an estate which the law calls an estate tail; that restriction was void, for if the same contained a greater estate limited in the one part, than would bear a restriction, the restriction being repugnant was void. In all the cases it was not what estate the ancestor took, but what estate the heirs took. To let them take the inheritance by purchase, they must be particularly designed, and if this was wanting in the present devise, the inheritance could not rest in the issue of *John Williams*. That individuals must not controul the general law, otherwise a door would be opened to uncertainty. Upon principle as well as upon authorities *John Williams* must be regarded as tenant in tail: his father willed that he should take for life, and that the heirs of his body should all succeed; this could not be done without making him tenant in tail.

Lord *Mansfield* said, he always thought that as the law had allowed a free communication of intention to a testator,

testator, it would be a strange law to say—" Now you
 " have communicated that intention, so as every body
 " understands what you mean, yet because you have
 " used a certain expression of art, we will cross your
 " intention, and give your will a different construc-
 " tion; though what you meant to have done is per-
 " fectly legal, and the only reason for contravening
 " you is, because you have not expressed yourself like
 " a lawyer." That his examination of the question
 always convinced him that the legal intention when
 clearly explained was to control the legal sense of a
 term of art, unwarily used by the testator.

It was true the rule in *Shelley's* case was laid down
 as stated, but that rule could never affect this question.
 The real sense and meaning of that rule was this: If
 the testator gives an estate for life only to *A.* remainder
 to the heirs of *A.*'s body; if the court had said *A.*
 was only tenant for life there would have been a con-
 tingent remainder to his issue, and then the issue
 would have been liable to be barred by any forfeiture
 of the tenant for life; and if he made an estate *pur*
auter vie, the remainder was gone: so that the best
 way of complying with the intention was, to give him
 an estate tail; by which means the issue were protected
 by the statute *De Donis*, and if an estate only for life
 was given, as it could have no use in the world but
 to cheat the lord of the feudal services, the law very
 prudently said that in such cases it should be an estate
 tail.

This rule was clear law, but was not a general proposition, subject to no controul, as where a testator's intention was manifestly on the other side, and where the objections might be answered. He found no cases in *Brooke* or *Fitzherbert* where these matters had come in question, so that the judges were agreed that the intention was to govern, and that *Shelley's* case did not constitute a decisive uncontrollable rule. This being settled the question was, whether in this case the testator had so explained his intention as to controul the technical expressions, and he agreed with his brothers that he had. It was known that the intention of trustees to support contingent remainders was usually attributed to *Bridgeman* and *Palmer* since the restoration: Then knowing that these estates might be limited in strict settlement, it was sufficient for the judges if it appeared that the testator (however he had explained himself) had a strict settlement in his eye, so that from what was said, and from the whole will, he concurred that the intention of the testator was lawful, and such as might be supported. If the intent was doubtful, if it was against law, the legal import of the words must govern. But here there could not be a doubt, the heirs of *John Williams's* body were to take as purchasers successively. That he should not content himself with general arguments, if any case could be found establishing a contrary doctrine, which led him to say he agreed with his brethren, *Aston* and *Willes*, that there was no case which contravened this general doctrine.

It was true great reliance was made on *Coulson v. Coulson*, but this was a very different case. That case might stand, and if ever any future litigation should arise upon a question exactly similar to that, he should submit to *Coulson v. Coulson*; though, if he was sitting in judgment upon that very will his determination would have been different. It had been said, that case was law, was the unanimous opinion of the court, was a respectable authority, and always was deemed such: he could not think so. *Denison* certainly did not agree with his brothers at first, but as he found them strenuously against him, he was very willing to acquiesce upon the certificate being signed. Lord *Hardwicke* speaking of *Coulson v. Coulson* confined it exactly within its own bounds; and further said—"If that case be law," which was a great deal for him to say; and so little satisfied with it was he, that the last thing he did in Chancery was to send *Sayer v. Masterman* here, and he told him he did it to have *Coulson* and *Coulson* reconsidered. It was said the conveyancers had rested on *Coulson v. Coulson*.

There was no sound distinction between the devise of a legal estate, and of a trust, and between an executory trust, and one executed: all trusts were executory, and in every shape that a will appeared, the intention must govern.

He admitted there was a devise to *John Williams* for life, and in the same will, a devise to the heirs of his body; and he agreed that this was within the letter of *Shelley's* case, and he did not doubt but there were,

and had been always, lawyers of a different bent of genius, and different course of education, who had chosen to adhere to the strict letter of the law: and they would say that *Shelley's* case was uncontrovertible authority, and they would make a difference between trusts and legal estates, to the harassing of a suitor.

His opinion therefore was that the intention being clear beyond doubt, to give an estate for life to *John Williams*, and an inheritance successively to be taken by the heirs of his body; and his intention being consistent with the rules of law, it should be complied with, in contradiction to the legal sense of the words used by the testator, so unguardedly and ignorantly.

Judgement was given that *John Williams* took an estate for life.

A writ of error was brought on this judgement, in the Exchequer Chamber; in which the judgement was reversed by the opinion of seven judges against one: so that, upon the whole, eight judges were of opinion that *John Williams* took an estate tail; and four, that he took only an estate for life.

Harg. Tra.
487.

§ 74. Sir *William Blackstone's* argument on this case, in the Exchequer Chamber, has been published by Mr. *Hargrave* from his own manuscript, of which the following is an abstract.

The great and fundamental maxim, upon which the construction of every devise must depend, is,
“ that

“ that the intention of the testator shall be fully and
 “ punctually observed ; so far as the same is consistent
 “ with the established rule of law, and no farther.”

Some rules of law are of an essential, permanent, and substantial kind, and may justly be considered as the indelible land-marks of property ; and which cannot be exceeded or transgressed by any intention of the testator, be it never so clear and manifest, such as, that every tenant in fee simple or fee tail, shall have the power of alienating his estate, by the several modes adapted to their several interests.

There are also other rules of a more arbitrary, technical and artificial kind, which are not so sacred as these, being founded on no great principle of legislation or national policy. Some of these are only rules of interpretation or evidence, to ascertain the intention of the parties, by annexing particular ideas of property to particular modes of expression ; so that, where a testator makes use of those technical modes of expression, it is evidence *primâ facie*, that he means to express the self-same thing, which the law expresses by the self-same form of words. Thus, a devise of land to another, generally, gives him an estate for life : a devise to a man and his heirs give him an estate in fee ; to a man and the heirs of his body an estate-tail.

Lastly, there are some rules which are not to be reckoned among the great fundamental principles of juridical policy, but are mere maxims of positive law,
 deduced

deduced by legal reasoning from some or other of the great fundamental principles, such as, that a devise to a man for life, with remainder to the heirs of his body, shall constitute an estate-tail.

The rule in *Shelley's* case is not to be reckoned among the great fundamental principles of juridical policy, which cannot be exceeded or transgressed by any intention of the testator; but is of a more flexible nature, and admits of many exceptions: for, if the intention of the testator be clearly and manifestly contrary to the legal import of the words, which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator.

The rule of law, laid down in *Shelley's* case, is, that where the ancestor takes an estate of freehold, with remainder to his heirs, or heirs of his body, the word "*heirs*" is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself; and the heir, when he takes, shall take by descent from him, and not as a purchaser. It was first established to prevent the inheritance from being in abeyance, and to facilitate the alienation of land.

This rule, when applied to devises, may give way to the plain and manifest intent of the devisor; provided that intent be consistent with the great and immediate principles of legal policy; and provided it be so fully expressed in the testator's will, or else may be
collected

collected from thence by such cogent and demonstrative arguments, as leave no doubt in any reasonable mind, whether it was his intent or no.

There is no such plain and manifest intent of the devisor in the present case, expressed, or to be collected from any part of this devise, as may controul the legal operation of the words, and, at the same time, be consistent with the fundamental rules of law.

The question is not, whether the testator intended that his son *John* should have a power of alienation: for he most clearly expressed, that the son should not have such a power. The question is not, whether the testator intended that his son should have only an estate for life; for he believed there never was an instance, when an estate for life was expressly devised to the first taker, that the devisor intended he should have any more. But if he afterwards gives an estate to the heirs of the tenant for life, or to the heirs of his body, it is the consequence or operation of law, that in this case supervenes his intention, and vests a remainder in the ancestor. And, therefore, it has frequently been adjudged, that, though an estate be devised to a man for his life, or for his life *et non aliter*, or with any other restrictive expressions, yet if there be afterwards added apt and proper words to create an estate of inheritance in his heirs, or the heirs of his body, the extensive force of the latter words should overbalance the strictness of the former, and make him tenant in tail, or in fee. The true question of intent would turn, not upon the quantity of estate intended to be given to

1 Vent. 225.
379.

John

John the ancestor, but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for life, was certain; that his heirs were intended to take after him, was equally certain: but, how those heirs were intended to take, whether as descendants or as purchasers, was the question? If the testator intended they should take as purchasers, then *John* the ancestor only remained tenant for life: if he meant they should take by descent, or had formed no intention about the matter, then, by operation and consequence of law, the inheritance first vested in the ancestor. The true question, therefore, was, whether the testator had, or had not, plainly declared his intent, that the heirs of the body of *John Williams* should take an estate by purchase, entirely detached from, and unconnected with, the estate of their ancestor? Or, in other words, whether he meant to put an express negative on the general rule of law, which vests in the person of the ancestor (when tenant of the freehold) an estate, that is given to the heirs of his body? It was not incumbent on the plaintiff to shew by any express evidence, that his testator meant to adhere to the rule of law: for that was always supposed, till the contrary was clearly proved. But it was incumbent on the defendant to shew, by plain and manifest indications, that the testator intended to deviate from the general rule: for that was never supposed till made out, not by conjecture, but by strong and conclusive evidence. By a devise to a man's heirs, or heirs of his body, the heirs had never been allowed to take as purchasers, excepting in one of these four cases. 1st, Where no estate

at all, or no estate of freehold, was devised to the ancestor, there the heirs could not take by descent, because the ancestor never had in him any descendible estate. 2d, Where no estate of inheritance was devised to the heir, as in the case of *White v. Collins*; for Ante. common sense would tell, that in such a case, the heir could not take by descent, as heir. 3d, Where some Ante. words of explanation were annexed by the deviser himself to the word heirs in a will, whereby he discovered a consciousness, distrust, or apprehension, that he might have used the word improperly, and not in its legal meaning, and, therefore, he in a manner retracts it, he corrects the inaccuracy of his own phrase, and tells every reader of his will how he would have it understood. 4th, Where the testator superadded fresh limitations, and grafted other words of inheritance upon the heirs to whom he gave the estate; whereby it appeared, that those heirs were meant by the testator to be the root of a new inheritance, the stock of a new descent, and were not considered merely as branches derived from their own progenitor. The evidence of intent, in this case, might be resolved into two particulars: 1st, The testator's previous declared intention, that none of his children should sell or dispose of his estate for longer term than his own life. 2d, The interposed estate to *Isaac Gale* and his heirs, on which much stress could not be laid; for, if that estate had been expressly given to preserve contingent remainders, (which was only a conjecture), the case of *Colson v. Colson* was an express authority, that this would not make the heir of the body a purchaser. If this was so, the introductory words were the only evidence of intent,

intent, and then the result of the whole matter was, that the testator having declared his intent that his son should not alien his lands, he, to that intent, gave his son an estate to which the law has annexed a power of alienation : an estate to himself for life, with remainder to the heirs of his body. Now, what was a court of justice to conclude from hence? Not that a tenant in tail thus circumstanced should be barred of the power of alienation ; this was contrary to fundamental principles. Not that the devisee should take a different estate from what the legal signification of the words imported ; this, without other explanatory words, was contrary to all rules of construction : but plainly and simply this, that the testator had mistaken the law, and imagined that a tenant for life, with first an interposed estate, and then a remainder to the heirs of his body, could not sell or dispose of his interest. Upon the whole, he concluded, that though it did appear that the testator intended to restrain his son from disposing of his estate, for any longer term than his life, and, to that intent, contrived the present devise, yet it did not appear by any evidence at all, much less by declaration plain, that, in order to effectuate that purpose, he meant that the heirs of the body of his son should take by purchase, and not by descent, or even that he knew the difference. The consequence was, that, by the legal operation of the words, which were not controlled by any manifest intent to the contrary, the heir could only take by descent, and, of course, *John Williams* the son was tenant in tail.

§ 75. It is observable that, in the several cases in which the question has arisen, whether the rule in *Shelley's* case should be applied or not, to the construction of a will, the objection to the application of the rule has always been founded on the obvious intention of the testator, to give the first devisee no more than an estate for life; without considering, that in all those cases, the testator devises the remainder, expectant on the determination of the first estate, to the heirs general, or special, or issue, of the first devisee; and that it is as necessary to ascertain his intention in the second, as in the first devise. There can be no doubt but that where a common person devises his estate to *A.* for life, with a remainder to his heirs general, or special, or issue, he does not mean to give him any greater estate than for his life. And as to the addition of negative words, or a devise to trustees to support contingent remainders, they can add nothing to the clearness of the first words. The whole difficulty therefore lies in ascertaining the intention of the testator in the second devise; and where it is inconsistent with the first devise, to adopt such a construction as will best effectuate his intention in both the devises. It is for this purpose that the rule is applied, upon a principle which has been already stated, and which is fully explained by Lord Ch. Just. *Wilmot* in the case of *Roe ex dem. Dodson v. Grew*; namely, that where a testator shews a particular, and also a general intent, which are inconsistent with each other, the general intent will be established, and the particular one disregarded. In all the cases where the rule has been applied, there was a devise to *A.* for life, with a

Conclusion.

Robinson v. Hicks, ante c. 12. f. 47.

Ante.

subsequent devise to the heirs general or special, or issue of *A.* and the testator had a particular intent, to give an estate for life only to *A.* and a general intent, to give estates to all the descendants of *A.* If the will were construed according to the particular intent, the first devisee would take an estate for life only, and the words heirs, or heirs of the body, or issue, must operate as words of purchase: But by this mode of construction the general intent, that all the descendants of *A.* should take successive estates of inheritance, either in fee, or in tail, would be defeated; for if the remainder was devised to the heirs of *A.*, it must vest in the person who was heir general to *A.* at the time of his death; and in that case it could not go in succession from him to succeeding heirs of the same ancestor, not being heirs general of the first heir, but might eventually go to strangers, either in defect or exclusion of the heirs of such ancestor. If the remainder was devised to the heirs of the body of *A.* it would vest in the person who was heir of the body of *A.* at the time of the testator's death, and would descend to the heirs of the body of that heir; and on failure of issue of that person, it would go, by a *quasi* descent, to the next person who answered that description, at the time of the failure of such issue, in conformity to *Mandeville's* case: so that if the devisee had several sons, the first would take an estate tail, but none of the other sons would take vested estates, while the eldest or any issue of his body were in existence. If the remainder was devised to the issue of *A.* the estate would vest in all his children, as joint-tenants for life, and tenants in common of the inheritance.

Fearne Con.
Rem. 301.

Vide Tit 32.
c. 24. f. 36.

1 Inst. 26 b.

Roe v. Grew,
Ante.

ritance. The consequence is, that in order to effectuate the general intent of the testator, which evidently is, that the estate devised shall go to all the descendants of the first devisee, and shall not go over as long as there are any such descendants remaining; the court is obliged to apply the rule, and to construe the second devise in such a manner as to create an estate in fee, or in tail, in the first devisee.

§ 76. This doctrine is fully confirmed by Lord *Thurlow*, in his determination of the case of *Jones v. Morgan*; in which his Lordship concluded his judgment in these words:—“ By all the cases, where the
 “ estate is so given that, after the limitation to the
 “ first taker, it is to go to every person who can claim
 “ as heir to the first taker; the word *heirs* must
 “ be words of limitation: all heirs, taking as heirs,
 “ must take by descent. In cases where I can bring
 “ it to the point, that the testator by the word heirs,
 “ as used in the will, means first, second, third, and
 “ other sons, there I change the words of the will;
 “ but here I think the word “ heirs ” was the very
 “ thing he meant. Suppose *William* had had a son,
 “ which son had had a son, and died, leaving Sir
 “ *William*, the eldest son of the son would have been
 “ heir. If there had been a title he would have
 “ taken it; but the estate, if these had been words of
 “ purchase, must have gone to the second son; the
 “ devise to the first son being a lapsed devise, like the
 “ case of *Warren v. White*, lately in the House of
 “ Lords from *Ireland*. But Sir *William Morgan*
 “ meant the estate to go to whoever should be heir.

Ante:

Ante ch. 8;

“ I think the argument immaterial, that he meant the
 “ first estate to be an estate for life. I take it, that in
 “ all cases the testator does mean so : I rest it upon
 “ what he meant afterwards. If he meant that every
 “ other person, who should be heir, should take, he
 “ then meant what the law would not suffer him to
 “ give, or the heir to take, as a purchaser. In con-
 “ versing with a great authority whom I will not
 “ name, I asked what would become, in the case
 “ stated, of the grandson : the answer was, he should
 “ take as heir. I know he might, but then he must
 “ take by descent : all possible heirs must take as
 “ heirs, and not as purchasers. Many cases have
 “ been determined on the ground of a devise to the
 “ first taker, with remainder to the heir male in the
 “ singular, or heirs male in the plural, as in *King v.*
 “ *Burchell* (before Lord *Henley*), where it was in the
 “ singular number. The rule in *Shelley's* case was
 “ used as a demonstration, that it was indifferent,
 “ whether the limitation was in the singular or in the
 “ plural number : it was equally an estate tail. So,
 “ where it is to the heir of the first taker, and to the
 “ heirs of that heir, it has been determined to be an
 “ estate tail. Indeed, in all cases, where the limita-
 “ tion is of an estate of freehold to a man, and after-
 “ wards to the heirs of his body (whether general or
 “ special), so as to give it to the heirs as a denomina-
 “ tion or class, the heirs shall be in by purchase, and
 “ not by descent. And the case, stated by *Anderson*
 “ in *Shelley's* case, of a limitation to the use of *A.*
 “ for life, remainder to the use of his heirs, and of
 “ their heirs female, is the only one to the contrary ;
 “ and

Ante.

“ and in that case the word “*heirs*” must be a
 “ description of persons, in order to let in the limita-
 “ tions to the heirs female.”

§ 77. Mr. *Fearne*'s conclusion to his observations Cont. Rem.
 on the rule, appears to have been founded on this 309.
 principle, or if not, is certainly conformable to it:
 for he says:—“ Wherever the ancestor takes the free-
 “ hold, the inheritance will not go to all the heirs,
 “ &c. in the course of inheritable succession, unless
 “ by an actual descent. And consequently if, after
 “ the first taker, it is to go to every person, who can
 “ claim as heir to him, the intended succession can
 “ only be effectuated by taking the word *heirs*, &c.
 “ as words of limitation. If after him, all heirs, &c.
 “ are to take as such, that is, as answering that de-
 “ scription, they can only take by descent. If the
 “ law will not admit of all possible heirs, &c.
 “ taking the inheritance, after its inception by a free-
 “ hold in the ancestor, otherwise than by descent, it
 “ follows, that wherever the limitation to the heirs,
 “ &c., after a freehold to the ancestor, is admitted
 “ to reach the whole denomination or class of heirs
 “ described, they must take by descent, and not by
 “ purchase.” *

* The student is referred to Mr. *Hargrave*'s very able and
 learned “ Observations concerning the Rule in *Shelley's Case*,”
 published in his Tracts, pa. 551. Mr. *Butler*'s note to 1 Inst.
 376 b. and Mr. *Pryson*'s succinct View of the Rule in *Shelley's*
Case.

TITLE XXXVIII.

DEVISE.

CHAP. XV.

Construction.—What Words create a Joint-Tenancy or Tenancy in Common, and Cross-Remainders.

§ 1. *What Words create a Joint-Tenancy.*

9. *What Words create a Tenancy in Common.*

25. *What Words create Cross-Remainders.*

§ 29. *Not to be implied between more than Two.*

36. *But this Doctrine has been altered.*

Section 1.

What Words
create a
Joint-Tenancy.
Anon. Cro.
Eliz. 431.

WITH respect to the words which create a joint-tenancy in a will, a devise to *A.* and *B.* generally, or to *A.* and *B.* and their heirs, makes them joint-tenants. So, where a man devised lands to his two daughters and their heirs, it was resolved, that they took an estate in joint-tenancy.

Oates v.
Jackson,
Sira. 1172.

§ 2. A person devised in these words,—“As to
“ *Wolf Park*, I give it to my wife for her life, and,
“ after her death, to my daughter *Isabella*, and her
“ children, on her body begotten by *W. A.* her husband, and their heirs for ever.” *Isabella*, at the time of making the will, had one daughter, and afterwards two sons and one daughter, who were dead with-

out

out issue. The question was, what estate passed to *Ifabella* and her children, and it was held, that she took as joint-tenant, it being stated, that at the time of making the will, she had a child, which had been construed to be equal to children. 1 Inst. 94.

§ 3 Lands were devised to *A. B.* and *C.* in tail, and then followed these words: "I will that every of them be the other's heir by equal portions." The court, at first, held this to be a tenancy in common: but, afterwards, upon good consideration, it was adjudged to be a joint-tenancy, for so it was implied; and it was as much as to say, that each survivor should be the other's heir. Fowler v. Ongley, And. 194. Webster's Case, 3 Leon. 19. infra.

§ 4. Where lands are devised to two or more persons, to hold to them and the survivor of them, they will take an estate in joint-tenancy, though there are other words in the will indicating a tenancy in common. Furfe v. Weeks, 2 Roll. Ab. 89.

§ 5. Thus, Lord *Hale* says, that a devise to two, equally to be divided between them, and to the survivor of them, makes an estate in joint-tenancy; upon the express import of the last words. 1 Vent. 216.

§ 6. A person devised to *Jane* the wife of *B.* and to *Elizabeth* the wife of *C.* all his estate, &c. to be equally divided between them during their natural lives, and, after the deceases of the said *Jane* and *Elizabeth*, to the right heirs of *Jane* for ever. And the only question was, whether this devise made *Jane* Tuckerman v. Jeffries, 3 Bac. Ab. 681. Holt's Rep. 370.

and *Elizabeth* joint-tenants for life, so as, upon the death of *Jane*, the whole survived to *Elizabeth* for life; or whether, upon the words equally to be divided between them, they were tenants in common?

Lord Chief Justice *Holt* pronounced the opinion of the court, that they were joint-tenants, notwithstanding the words, “*equally to be divided among them,*” and the lands ought to survive to *Elizabeth*: 1st, For though upon such words, generally they would be tenants in common, yet if it should be so in this case, it would be expressly against the intent of the testator, and would defeat the heirs of *Jane* of part; for they were to take all together, and not by moieties, one at one time, and one at another, but all at once; and if they should be tenants in common, they must take by moieties at several times. 2dly, It was express, that the heirs of *Jane* were not to take till after both their deceases. 3dly, If they should be tenants in common, then the heirs of *Jane* would be in danger to lose a moiety: for, as to that one moiety, it must be a contingent remainder; so that, if *Elizabeth* should die during the life of *Jane*, the contingency for that moiety not happening, it must descend to the heirs at law of the testator, who were *Elizabeth* and the issue of *Jane*, as coparceners. 4thly, *Jane* and *Elizabeth* were heirs at law to the testator, and, as such, the whole would have descended to them in coparcenary, if no will had been made; but here, by this will, it was plain, the testator intended to prefer the heirs of *Jane* to the whole.

Adjudged accordingly.

§ 7. *A. Hawes* devised all his estate in *D.* to his four younger children, *A.*, *B.*, *C.*, and *D.*, their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, with benefit of survivorship. The question was, whether the four children took as tenants in common generally, or as tenants in common, with some sort of benefit of survivorship.

Hawes v.
Hawes,
1 Will. R.
165.

Lord *Hardwicke* said, that, in Chancery, joint-tenancies were not favoured ; because they were a kind of estate that did not make provision for posterity : neither did courts of law at this day favour them, though Lord *Coke* says, that joint-tenancy is favoured, because the law was against the division of tenures ; but, as tenures were abolished, that reason had ceased, and courts of law inclined the same way with courts of equity. Another rule was, that where there were contradictory words in a will, the court made a reasonable and uniform construction, and would reject such words as were absurd, and contradictory to the intent of the testator. The words, “ *equally to be divided,*” in a will, made a tenancy in common : here was also added, “ as tenants in common, and not as joint-tenants,” which were very strong words ; but then, it was also said, “ with benefit of survivorship,” which last words created the difficulty in the case ; that is, to know at what time the testator intended this benefit of survivorship should take place. And this might be explained by another part of the will, where he plainly pointed out a survivorship among the children themselves, as to his personal estate, where the words were ;

“ If any of my younger children die under age and
 “ unmarried, then I direct that the share of him so
 “ dying, shall go to the survivors.” Then he came
 to this devise of his real estate, to his said four younger
 children; but it was true, he did not say, with *like* be-
 nefit of survivorship. He thought it was natural to
 consider this as a fund or provision for these four
 children; and that he meant, if any of them should
 die before 21, or unmarried, that the share of the
 child so dying should go among the other children:
 and he was of opinion that, C. dying under age, his
 share did survive to the others, and should not go to
 the heir at law.

Chap. 9. f. 22. § 8. It has been stated in a preceding chapter, that,
 where there are two different dispositions of the same
 estate in a will, the two devisees shall take in moieties;
 1 Inst. 112 b. and Mr. *Hargrave* says, that in some of the old books,
 n. 1. it is said generally, that there shall be a joint tenancy;
 2 Atk. 373. but, according to the modern opinion, and, it seems,
 3 Atk. 493. the best, there will be a joint tenancy, or tenancy in
 common, according to the words used in limiting the
 two estates; by which, it is meant, that, if the two
 estates given by the will have the unity or sameness of
 interest, essential to a joint-tenancy, the devisees shall
 be joint-tenants; but, otherwise, shall be tenants in
 common.

What Words
 create a Te-
 nancy in
 common.

§ 9. Wherever an estate is devised to two or more
 persons, and there are any words in the will indicating
 an intention, that the devisees shall take several and
 distinct shares, they will be tenants in common.

§ 10. A man

§ 10. A man devised his lands to his wife for life, the remainder to *A.*, *B.*, and *C.*, and their heirs respectively, for ever. The question was, whether *A.*, *B.*, and *C.*, were joint-tenants, or tenants in common? The court held, that here was a tenancy in common, and that it should go throughout, and was not to be divided: and the intent of the devisor appeared in the will, that every one should have his part, and their heirs; so here was a provision made for children, and the word, “*respectively*,” would be idle, if another construction should be made, and would signify no more than what the law said without it.

Torret v.
Frampton,
Stiles, 434.

§ 11. Lands were devised to five persons, their heirs and assigns, all of them to have part and part alike, and the one to have as much as the other. Adjudged to be a tenancy in common.

James v.
Collins,
Het. 29.
Cro. Car. 75.

§ 12. One *Lewen* devised lands to his two sons equally, and their heirs. It was adjudged, that the devisees took as tenants in common; for, otherwise, the word “*equally*” would have no meaning.

Lewen v.
Cox, Cro.
Eliz. 695.
1 Vern. 32.

§ 13. A person devised a messuage, with the appurtenances, unto *M. G.* and *T. R.* equally to them, his sister's sons. Lord *Mansfield* said, there was no room for argument; “*equally*” implied a division: whereas, if they were to take as joint-tenants, there would be no division.

Denn v.
Gaskin,
Cowp. 657.

Vide Tit. 32.
c. 24. s. 51.

§ 14. The words, “*equally to be divided*,” have always been held to create a tenancy in common in a will,

will, because they imply a division : whereas, between joint-tenants, there is no division, unless there are other words in the will ; as, in some of the preceding cases, giving a right of survivorship.

King v.
Rumbal,
Cro. Ja. 448.
3 Rep. 39.
3 Mod 209.

§ 15. A man devised to his wife for life, and, after her decease, to his three daughters, equally to be divided ; and if any of them died before the other, then the survivors to be her heirs, equally to be divided ; and if they all died without issue, then to others, &c. It was held, that the daughters were not joint-tenants, but that they had several inheritances in tail, with cross-remainders.

Blissett v.
Cranwell,
Salk. 226.

§ 16. A man devised lands to his two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife. The court was of opinion, that the sons were tenants in common, and that the devise was good ; and the reason was upon the construction of wills, that it ought to be according to the intent of the devisor ; his intent appearing to be, not only to provide for his two sons, but for their posterity ; that not only his two sons, but their heirs, should have an equal part : for the words were, “ *equally to be divided between them and their heirs.*” And though, by the first words, it was given to them and the survivor of them, yet the last words explained what he intended by the word “ *survivor ;*” that the survivor should have an equal division with the heirs of him who should die first. And, though the testator had not aptly expressed himself, yet, upon all the words taken together, his meaning seemed to be so.

§ 17. A person

§ 17. A person devised two leasehold houses to J. P. and J. H. and then said, My will and meaning is, that the rents of my two said houses shall be equally shared and divided between them the said J. P. and J. H. as aforesaid. It was held, that the devisees took as tenants in common.

Prince v.
Halplin,
1 Atk. 493.

§ 18. A person devised a freehold estate to trustees and their heirs, in trust to permit his three sisters and their assigns to hold and enjoy the said premises, and to receive the rents thereof to their sole and separate use ; and as his said sisters should severally die, he gave the premises to their several heirs. Lord *Hardwicke* held, that the plain meaning of the words, “ as they severally die,” &c. was, that the sisters should take as tenants in common.

Sheppard v.
Gibbons,
2 Atk. 441.

§ 19. A testator devised all his real estates to trustees, as soon as his three daughters should attain their respective ages of 21, to convey to them and the heirs of their bodies, and their heirs, as joint-tenants. Lord *Hardwicke*, after observing that, on account of the direction to convey, this was an executory trust, in which case, the court assumed greater latitude of moulding the will according to the intention of the testator, gave his opinion, that the daughters did not take as joint-tenants, but that conveyances should be made to them at 21 respectively in tail, with cross-remainders in tail ; by which means, survivorship would be preserved upon the death of any daughter without issue, which was the most that was meant by joint-tenants.

Maryat v.
Townley,
1 Ves. 102.

§ 20. A devise

Stones v.
Heurtly,
1 Ves. 165.

§ 20. A devise of lands to trustees for payment of debts, the remainder to go and be equally divided among his three younger children and the survivor of them, and their heirs for ever, was held by Lord *Hardwicke* to create a tenancy in common.

Rose v. Hill,
3 Burr. 1881.

§ 21. A person devised lands to his five children, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants. It was contended, that this was a tenancy in common amongst the five children for life, with survivorship to the longer liver of them. Lord *Mansfield* said, that an estate to more than one, with a benefit of survivorships, was a joint-tenancy. But, here, the testator had expressly declared, that they should not take as joint-tenants. It was plain, that the children were not to take as joint-tenants, and also, that the testator considered, that several of his five children might happen to die in his own lifetime, and therefore made a provision for such of them as should survive him, and be in existence at the time when the interest was to vest, and their representatives. He meant to prevent a lapse; and, therefore, the court might rather apply the words to a fixed particular time, than give no meaning at all to them. And this was agreeable to the case of *Stringer v. Phillips*. Judgment that the children took as tenants in common.

1 Ab. Eq.
292.

Garland v.
Thomas,
1 Bos. & Pul.
N R. 82.

§ 22. *Robert Clarke* devised his estate to trustees and their heirs, to the use of the testator's niece *Susanah Clarke*, and his two nieces *Elizabeth Garland* and

Ann

Ann Corry, and the survivor and survivors of them, and the heirs of the body of such survivor and survivors, as tenants in common, and not as joint-tenants, and for want of such issue remainder over.

Upon a case sent by the Master of the Rolls for the opinion of the Court of Common Pleas, the Judges of that court certified, that the devisees took as tenants in common.

§ 23. It has been stated, that two persons may have an estate in joint-tenancy for their lives, and be tenants in common of the inheritance. These estates may be created by will as well as by deed.

Tit. 18. c. 1.
f. 43.

§ 24. A person devised an estate to be sold for the payment of debts and legacies, and directed, that the surplus of the money should be laid out in the purchase of lands, to be settled to the use of the testator's two nephews, and the survivor of them, and their heirs, equally to be divided between them, share and share alike. The question was, whether these words created a joint-tenancy, or a tenancy in common?

Barker v.
Giles,
2 P. Wms.
280. 3 Bro.
Parl. Ca. 104.
Barker v.
Smith,
9 Mod. 157.
S. C.

Lord *King* said, it was a certain rule, in the exposition of wills especially, that every word should have its effect, and not be rejected, if any construction could possibly be put upon it; and here he thought there might. The first part of the devise being to two, and the survivor of them, made them plainly joint-tenants for life, and, therefore, they should be so taken. And then, as to the next words, “and to their heirs
“ equally

“equally to be divided between them, share and share alike,” these were plainly words importing a tenancy in common, and should operate accordingly, so as to make them tenants in common of the inheritance; by which construction of the will, every word would take place.

A decree was made accordingly, which was affirmed by the House of Lords.

What Words
create Crofs
Remainders.

§ 25. With respect to the words by which crofs remainders are expressly created in a will, they are of course the same as those which are used for that purpose in a deed. But crofs remainders may arise in a will by implication of law, where it appears to have been the intention of the testator, that there should be crofs remainders.

Clache's Case,
Dyer 303.
330.

§ 26. *A.* having issue five sons, his wife being enſient with the sixth, devised two-thirds of his lands to his four younger sons, and the child in *ventre matris*, if it was a son, and their heirs; and if they all died without issue male of their bodies, or any of them, that the lands should revert to the right heirs of the devisor. It was adjudged that the younger sons were tenants in tail, with crofs remainders to each of them. For it was clearly the intention of the testator that no part of the estate devised should revert to the heirs of the devisor, as long as any issue remained of any of his younger sons.

§ 27. A man

§ 27. A man having two sons devised part of his lands to one of them and his heirs, and the remaining part to the other and his heirs: and added this item, I will that the survivor of them shall be heir to the other, if either of them die without issue. Adjudged that they were tenants in common in tail, with cross remainders.

Chadock v. Cowley,
Cro. Ja. 695.

§ 28. A testator devised in these words—"I give all my lands in *M.* to my two daughters *Elizabeth* and *Ann*, and their heirs, equally to be divided between them; and in case they happen to die without issue, then I give and devise all the said lands to my nephew." It was adjudged that the two daughters took estates tail with cross remainders.

Holmes v. Meynell,
T. Raym. 452.
2 Show. 135.

§ 29. It was however laid down by the judges in the reign of *Cha. I.* that cross remainders should not be implied between more than two persons. And Mr. Serjeant *Williams* observes that this doctrine was established for two reasons; one was to prevent as well the confusion which it was said would follow from the division of an estate among many, as the uncertainty which would arise whether the surviving shares should vest in them as joint-tenants, or tenants in common, and for what estate. The other, which was a technical reason, was to avoid the splitting of tenures.

Not to be implied between more than two.

1 Saund. Rep. 185 a. n. 6.

§ 30. A person having three sons, and being seised of three houses, devised a house to each son, and his heirs; with a proviso that if all his said children should die without issue of their bodies begotten, that then

Gilbert v. Witty,
Cro. Ja. 655.

all

all his said messuages should remain over, and be to his wife and her heirs. It was adjudged that these words did not create cros remainders between the sons, but that on the death of any one of them without issue, his house should go over to his mother. And *Doderidge* said that although in a devise to two persons there might be cros remainders by implication, yet that in a devise to three, cros remainders should never be implied, on account of the uncertainty and inconvenience.

Cole v.
Levingston,
1 Vent. 224.

§ 31. In a subsequent case Lord *Hale* said, that cros remainders should not be created between three persons, unless the words of the will plainly proved the intent of the testator to have been so. As if *Blackacre* were devised to *A. Whitacre* to *B.* and *Greenacre* to *C.* and if they all die without issue of their bodies, *vel alterius eorum*, then cros remainders would be allowed.

Comber v.
Hill,
Stra. 969.

§ 32. *Richard Holden* devised lands to his grandson *Richard Holden*, and grand-daughter *Ann Holden*, equally to be divided, and to the heirs of their respective bodies; and for default of such issue, to another person. It was determined that there were no cros remainders between *Richard* and *Ann Holden*, because there were no express words, nor any necessary implication to raise them; for the mere words, “and “for default of such issue,” being relative to what went before, only meant, and for default of heirs of their respective bodies; and then it was no more than if it had been a devise of a moiety to *Richard* and the heirs

heirs of his body, and of the other moiety to *Elizabeth* and the heirs of her body, and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt.

Williams v. Brown,
Stra. 996.
S. P.

§ 33. In the case of *Doe v. Cooper* which has been stated in a former chapter, Mr. Justice *Lawrence* observed that the principal part of the plaintiff's argument was founded upon the raising of cross remainders by implication between the issue of *Richard Cook*: but it was a settled rule that they should not be implied between more than two, unless such appeared upon the face of the will to have been the intention of the testator: but no such intent appeared in that case from the words of the will, nor could it be implied merely from the circumstance that the remainder over was not to take effect, but upon the dying of *Richard Cook* without leaving issue. Ch. 12.

§ 34. *John Owen* being seised in fee of two messuages, devised them to his wife for her life, and after her decease to his son and daughter *John* and *Margaret* to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue to his wife in fee. Lord *Hardwicke* was of opinion that this will was not so penned as to create cross remainders, which not being favoured by the law could only be raised by an implication absolutely necessary; and that was not the case here, for the words several and respective effectually disjoined the title.

Davenport v. Oldis,
1 Atk. 579.

Perry v.
White,
Cowp. 777.

§ 35. A person devised to his four sisters, and a niece for their lives, share and share alike, as tenants in common, and not as joint-tenants, remainder to their sons successively in tail male, remainder to their daughters in tail, the reversion to his own right heirs.

Lord *Mansfield* said, that wherever cross remainders were to be raised by implication between two, and no more, the presumption was in favour of cross remainders, where they were to be raised between more than two, there the presumption was against cross remainders; but that presumption might be answered by circumstances of plain and manifest intention either way. This was a qualification of the rule laid down in former cases; for they seemed to say that there should not be cross remainders between more than two; but the true rule was to take it with the qualification above stated. Here the presumption was against cross remainders, and judgement was given that there were no cross remainders.

But this Doctrine has been altered.

1 Saund. R.
18; a. n. 6.

§ 36. Mr. Serjeant *Williams* observes that the rule of cross remainders has of late years been construed with some qualification, and the learning of courts of justice seems to have been in favour of them; for the settled distinction now is, as laid down by Lord *Mansfield* in the preceding case.

Doc v. Bur-
ville, cited
2 East, R. 472

§ 37. A person after devising to his sons in succession for life, with remainder to the heirs male of their

their bodies, remainder to the heirs female of their bodies, devised to the use of all and every his daughter and daughters as tenants in common, and not as joint-tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother *Abraham* for ever. Lord *Mansfield* said the question was, whether the intent was so plain as that it could not be effectuated without giving cross remainders; and the court thought that it was plain and unavoidable to give cross remainders. The testator had three sons to each of whom he gave several estates in tail. His plan was to follow the course of descent, by preferring even the female line of each of his sons (in failure of the male) before his other sons and their male line, and before his own daughters. He thought the coming to his daughters a remote contingency, he therefore made use of the words daughter and daughters; all and every; if two or more; supposing that the number might be reduced before they might become entitled. He took for granted that a remainder to his brother *Abraham*, who was alive when he made the will, could not take place till failure of his own issue; therefore he limited the remainder to the heirs of his brother *Abraham*, supposing it not likely to happen in his time. He also limited the remainder in the singular number; conceiving it could not take effect till the death of the last daughter without issue.

“ We think these words are equivalent to an express declaration that there shall be cross remainders. In all the limitations the female line of each son must fail, before the male line of the other sons shall take, and all must fail before the daughters could

“ take: Then it would be absurd to suppose that he
 “ meant to devise over the shares of any of his own
 “ daughters dying, from the rest, when he had not
 “ done so by his sons daughters; or that he should
 “ have given to the heirs of his brother, the share of
 “ one of his own daughters dying, while any of them
 “ was left: for if *Abraham* had no children, then
 “ the daughters would be his heirs. Therefore we
 “ think he has given all his daughters the estate, with
 “ cross remainders as fully as if he had given them in
 “ the most express words.”

Wright v.
 Holford,
 Cowp. 31.

§ 38. A devise was in these words—“ To the use
 “ of all and every the daughter and daughters of the
 “ body of *P. H.* and to the heirs of her and their
 “ body and bodies lawfully issuing, such daughters if
 “ more than one to take as tenants in common and
 “ not as joint-tenants; and for default of such issue
 “ to the right heirs of the devisor for ever.” There
 were two daughters and one of them having died an
 infant, the question was whether her sister became
 entitled to her moiety. On a case being sent out of
 the Court of Chancery for the opinion of the Judges
 of the King’s Bench the certificate was—“ There are
 “ no words in the instrument which intimate any
 “ intention to limit over the respective shares of the
 “ two daughters dying without heirs of their bodies
 “ respectively: on the contrary the limitation over is
 “ of the whole estate, limited to all the daughters,
 “ and is to take place on the express contingency of
 “ failure of all and every the daughter and daughters,
 “ and the heirs of their body and bodies; and the
 “ limitation

“ limitation over on default of such issue is, to the
 “ heir at law. Consequently we are of opinion, that
 “ as nothing is given to the heir at law, whilst any
 “ of the daughters or their issue continue, they must
 “ amongst themselves take cross-remainders.”

§ 39. *George Phipard* devised an estate to his brothers *William* and *John*, and his sister *Elizabeth*, and the heirs of their bodies, as tenants in common, and not as joint-tenants; and, for want of such issue, to his own right heirs for ever. Upon a case sent out of Chancery for the opinion of the Judges of the King's Bench, whether there were cross-remainders created by the will, Lord *Mansfield* said, that the reason given in the old cases against raising cross-remainders, to prevent the splitting of freeholds, had not very great weight at the time it was given, and certainly had none now. To be sure, where they were to be raised between two, and no more, the favourable presumption was in support of cross-remainders; where between more than two, the presumption was against them; but the intention of the testator might defeat the presumption in either case. In *Davenport v. Oldis*, where the question was, whether cross-remainders should be raised between two only, Lord *Hardwicke*, by way of general observation, laid it down, that the words, in default of such issue, should not merely in themselves create cross-remainders. But, since that time, in the case of *Wright v. Holford*, the court went expressly on the distinction of there being no words, such as, respectively, to sever the titles; but that the limitation over being, in default of all the issues, the rule of construction

Phipard v. Mansfield, Cowp. 797.

Ante.

Ante.

struction laid down as between two should obtain. The case of *Wright v. Holford*, therefore, upon full consideration, says, that these words shall lay such a foundation, as to create cross-remainders: and, in general, he believed, in devises of this kind, the intention of the testator was in favour of cross-remainders. But there must be some circumstances manifesting such intention. In the present case, the testator had two brothers and a sister; if he meant his estate should have gone to his heir at law, there was no occasion to make a will, therefore, it was clear he did not mean his brother *John* should take it as heir, or that *William* should do so. But he meant that his sister should be equally an object of his bounty. It was clear, that he meant no division should take place to create an inequality between them till a failure of the heirs of all their bodies. He, therefore, began with the disposition thus: "As to all my temporal estate, I give my lands
 " to my two brothers and my sister, and to the heirs
 " of their bodies lawfully begotten." These were the words of an ignorant man, and the will was inaccurately drawn; for there could not be a limitation to two brothers and a sister, and to the heirs of their three bodies. The Court, therefore, must mould them as near to the intent of the testator as they could. The lands, he said, were equally to be enjoyed by his brothers and sister, and the heirs of their bodies. It was impossible to have expressed his intention that his sister should take equally with his brothers more plainly. He meant his estate should continue fettered with an intail as long as the existence of the persons then in being, and their issue; and that his heir at law should take

take nothing till after that entail was determined: whereas, if the construction were to be, that the heir at law should take upon the failure of issue of any one, the elder or the younger brother, as the case might happen, would then take a fee in the share of the deceased brother or sister, and so create an inequality, which the testator never intended to make. For it was limited to them, and the heirs of their bodies, and for want of such issue; want of issue there, plainly meant issue of all of them. How could it then be executed, but by raising cross-remainders? It seemed to be as strong a case as that of *Wright v. Holford*. The other Judges concurred, and the Court certified that there were cross-remainders.

§ 40. A person devised to all and every the daughter and daughters of the body of his daughter *Martha*, and the heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common, and not as joint-tenants; and for and in default of such issue, he gave and devised all his said premises unto his right heirs for ever. Upon a case sent out of Chancery for the opinion of the Judges of the King's Bench, Lord *Kenyon* said, that, as between two only, it should be presumed that cross-remainders were intended to be raised; but if there were more than two, it was necessary to resort to other words in the will to discover an intention to raise cross-remainders: but, here, there was no doubt from the words of the limitation over, but that the deviser intended to raise cross-remainders between the granddaughters. The testator clearly intended that the whole

Atherton v. Pye, 4 Term Rep. 710.

should go together, whereas, if no cross-remainders were raised between the granddaughters, it would go to the right heirs by separate portions on the death of each grand-daughter.

Ante.

Mr. Justice *Buller* said, this was a stronger case for raising cross-remainders than that of *Phipard v. Mansfield*; for here, besides the words, for default of such issue, namely, issue of all of them, the devise over is of *all* the devisor's estates. Now, they could not all go together, but by making cross-remainders between the grand-daughters.

The Court certified, that the daughters of *Martha* took estates in tail-male with cross-remainders.

§ 41. It is observable, that the words, several and respective, were relied upon in the cases of *Comber v. Hill*, and *Davenport v. Oldis*, to shew that the limitation over was to take place upon failure of either of the daughters, and their issue respectively. But, in the following case, cross-remainders were raised by implication, notwithstanding the use of the word respective.

Watson v.
Foxon,
2 East. R.
36.

§ 42. A person devised an estate to all and every the younger children of *Mary Foxon*, begotten or to be begotten, if more than one equally to be divided among them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint-tenants. And, if the said *Mary Foxon* shall have only one child, then to such only child, and to the heirs of

his

his or her body lawfully issuing ; and, for want of such issue, he gave and devised the said premises to *C. N.* The question was, whether cross-remainders were raised between the younger children of *Mary Foxon*.

Lord *Kenyon* said, that where cross-remainders were to be raised by implication between two, and no more, the presumption was in favour of cross-remainders : where they were to be raised between more than two, the presumption was against them ; but that presumption might be answered by circumstances of plain and manifest intention, either way. Whatever was declaratory of the intention of the party, he took to be expressed. No technical words were necessary to convey an intention ; but if, taking the whole instrument together, there was no doubt of the party's meaning, the court arrived at the conclusion. Now, here the testator set out with devising all his farm, &c. to his daughter and grand-daughter for their lives, remainder after the death of the survivor to all and every the younger children of *Mary Foxon* ; if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common ; and, if only one child, then to such only child, and the heirs of his or her body, &c ; and for want of such issue, he gave and devised the said premises to his son-in-law *C. N.* (What he meant by the said premises was evident, and could not have been rendered clearer by saying, *all* the said premises, though it might have served to multiply words). Then after several limitations, and for want of such issue, he proceeds to divide the estate into thirds, to go to different persons :
till

Comber v.
Hill,
Davenport
v. Oldis,
Ante.

till then, the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress was laid here upon the word *respective*, as disjoining the title; and the authority of Lord *Hardwicke* was referred to in the cases mentioned. No person regarded whatever fell from that great Judge with more reverence than he did; but it was unworthy of his great learning and ability, to lay such stress, as he was stated to have done, on the word "*respective*." Creating a tenancy in common divided the title as much, whether the word "*respective*" was used or not. And, as to what might have been said by other judges, with reference to the opinion delivered in *Comber v. Hill*, and *Davenport v. Oldis*, in subsequent cases, where the word "*respective*" did not occur; feeling themselves right on the principle on which they proceeded, it was not to be wondered at, that they were desirous of relieving their own minds from the weight of Lord *Hardwicke's* opinion, that there was a distinction between the cases, in the omission of that word on which he so much relied: but it was too much, to infer from thence that those Judges, therefore, approved of his opinion, or that their judgments were governed solely by that consideration. In the case of *Atherton v. Pye*, the devise over, in default of such issue, was of *all* the testator's said lands: and stress was laid by some of the Judges on the word *all*, in support of raising cross-remainders between the issue, he would not say by implication, but by what the Judges collected to be the intention of the testator. But the word "*all*" was not decisive of that case, and, in truth, made no difference in the sense; for a

Ante.

devise over of the said premises, or the premises, or all the said premises, meant exactly the same thing. Admitting, therefore, the general rule, that the presumption was not in favour of raising cross-remainders by implication between more than two, still that was upon the supposition, that nothing appeared to the contrary, from the apparent intention of the testator. He had no doubt here, but that the testator intended to give cross-remainders among the issue of *M. F.* The devise over of the premises meant all the premises: he intended that all the estate should go over at the same time. He thought Lord *Mansfield's* quarrel with *Davenport v. Oldis* well founded: and he agreed with the cases of *Wright v. Holford*, and *Phipard v. Mans-* Ante.
field; and he could not distinguish this case from those. He was clearly of opinion, that the intention of the testator was the polar star, by which the court should be guided in the construction of wills, where no law was infringed; and, here, the intention was clear to give cross-remainders. The other Judges concurred; and judgment was given accordingly.

TITLE XXXVIII.

DEVISE.

CHAP. XVI.

Construction.—*What Words create a Condition, and make Lands liable to Debts, and enable Persons to sell Lands.*

- | | |
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| § 1. <i>What Words create a Condition.</i> | 13. <i>What Words enable Persons to sell Lands.</i> |
| 4. <i>What Words make Lands liable to Debts.</i> | |

Section 1.

What Words
create a Con-
dition.

1 Infl. 236 b.

WITH respect to the words that are necessary to make a devise conditional, it is laid down by Lord Coke, that many words in a will make a condition in law, that make no condition in a deed. As a devise of lands to an executor *ad vendendum*; so if lands be devised to one *ad solvendum*, 20*l.* to J. S. or paying 20*l.* to J. N. this amounts to a condition.

Crickmer's
Case,

1 Infl. 236 b.

§ 2. A man seised of certain lands held in socage, having issue two daughters, A. and B. devised all his lands to A. and her heirs, to pay unto B. a certain sum of money, at a certain day and place. The money was not paid; and it was adjudged that the words, "to pay, &c." did amount in a will to a condition: and the reason was, for that the land was devised

devised to *A.* for that purpose, otherwise *B.* to whom the money was appointed to be paid would be without remedy; and the lessee of *B.* upon an ejectment recovered a moiety of the lands against *A.*

§ 3. A person devised his estate to his second son in fee, upon condition to pay to his four daughters 20*l.* each at their full age. This was held to be a condition; for it should be expounded according to the common law, where it was not necessary to expound it to the contrary. But where a devise was to an eldest son upon such a condition, if it should be expounded to be a condition it would be void and to no purpose, for it would descend upon the eldest son, and no remedy could be had against him.

Curteis v. Wolverston,
Cro. Ja. 56.

Wellock v. Hammond,
Cro. Eliz. 204.
Vide Tit. 16.
c. 2. f. 30.

§ 4. By the common law, real estates are not subject to the payment of debts due on simple contract, unless made so by will, which is considered by many as a great defect, because credit is in fact given to the possessors of landed estates, in proportion to the value of such estates. He therefore who neglects to charge his lands with the payment of his debts, sins, as it has been emphatically said, in his grave: and if he omits this circumstance on purpose to defeat the demands of his creditors, he dies with a deliberate fraud in his heart.

What Words
make Lands
liable to
Debts.

§ 5. These principles have given rise to a rule both at law and in equity, that whenever a testator expresses an intention that all his debts shall be paid; or devises all his property subject to the payment of his debts;
these

these words shall operate so as to render his real estates subject to his debts.

Bowdler v.
Smith,
Prec. in Cha.
264.

§ 6. A person devised in these words—as to my temporal estate wherewith God hath blessed me, I give and dispose thereof as followeth. First, I will that all my debts be justly paid, which I shall at my death owe, or stand indebted in, to any person or persons whatsoever. Also I devise all my estate in *G.* to *A. B.* and this was all the estate the testator had. Held that this will created a charge on the real estate for payment of debts.

Trott v.
Vernon,
Prec. in Cha.
430.

§ 7. A man being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words—*Imprimis*, I will and devise that all my debts, legacies, and funerals, shall be paid and satisfied in the first place. It was held that this clause amounted to a charge on his real estate for the payment of debts and legacies.

Beachcroft v.
Beachcroft,
2 Vern. 690.

§ 8. A will began with these words—“As to all my worldly estate, my debts being first satisfied, I devise the same as follows, &c.” The court held it clear in this case that no land, nor any part of the testator’s worldly estate was devised, till after his debts paid; consequently that the land was charged, and that it would have been sufficient, though the word, first, had been omitted.

Harris v.
Ingledew,
3 P. Wms. 91.

§ 9. A person made his will to this effect; “As to all my worldly estate, my debts being first satisfied,
“ I devise

“ I devise the same as follows, &c.” The Master of the Rolls was of opinion that no land, nor any part of the testator’s worldly estate, was devised, till after his debts were paid; consequently that the land was charged.

§ 10. A will began in these words—“ As to my worldly estate which it hath pleased God to bestow upon me, I give and dispose thereof in manner following (that is to say) *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid.” It was decreed by Lord King that these words made the lands of the devisor liable to his debts; and this decree was affirmed in the House of Lords.

Legh v. Earl of Warrington,
1 Bro. Parl. Ca. 511.

Godolphin v. Penneck,
2 Vef. 271.
Hatton v. Nichol,
Forrest 110.

§ 11. *John Ivy* in the beginning of his will recited that he had made a former will in the life of his wife, in which he had given to her all his real and personal estate; that he had the misfortune to lose her, and therefore he made his will for the disposition of the same. First, he ordered all his debts and funeral charges to be honourably paid after his decease. In a subsequent clause he devised particular premises, enumerating them, excepting *H.* and *R.* all which enumerated lands, except *H.* and *R.* he devised to trustees, by and out of the money arising by sale, and out of the rents and profits thereof, in the mean time, in the first place to pay and discharge his debts, funeral expences, and all legacies given by his will, or by other writing under his hand. He afterwards went on and said, that *H.* and *R.* should be in the first place for payment

Thomas v. Brittnell,
2 Vef. 313.

payment of the legacies mentioned in his will. On a bill by the creditors to have the real estate by the will subjected to payment of their debts, in aid of the personal, so far as that proved deficient, insisting that the whole real estate was by the will established as a fund for payment of debts. And whether the whole, or any and what part, of his real estate was subject to debts was the question.

Sir J. *Strange* M. R. said the word *same* must relate to the real and personal estate before given; and if it stood on that, and the word first, only, he should have no doubt but that his whole real estate would be subject to the payment of debts; not from any express mention made that they should be a charge on his real estate, but from that construction the court makes for the benefit of creditors, and that men should not sin in their graves. Here was no express declaration on the outset of the will that the testator's whole real estate should be charged with payment of his debts, therefore it was necessary to look farther into his will, and see what was the intent of the testator, who was not bound in fact, though bound in honor, to make such a disposition for his creditors. Considering the whole he had subjected the greatest, but not every part of his real estate to the payment of debts, having excepted a particular part, and applied it to another purpose, not intending that *H.* and *R.* should be liable to be swallowed up by creditors, to the prevention of the legatees under his will. But afterwards directed what should be done with *H.* and *R.* He had personal estate which he could not exempt from payment
of

of his debts; he had real, the whole of which he might subject; in declaring his intent as to that he exempted *H.* and *R.* entirely, reserving them as a fund for legacies only. On the clauses therefore altogether (and which were only clauses by which he expressly charged his land therewith) he considered how far his real estate should be chargeable to creditors, and then thought himself at liberty to apply the other part to satisfy legatees. Therefore, though on the first part the court might take the whole real to be charged with debts, yet as there was no express lien on the real by these general words, and afterwards he distributed such part of his real for debts, and such for legacies, it was too much to lay hold on the general words to say the whole should be charged with payment of debts. It could only be done by implication on the general words, which might be explained afterwards, and that implication destroyed. Consequently the plaintiffs could only have a decree for an account of the personal estate, and then the other parts of the real estate, except *H.* and *R.* for payment of their debts.

§ 12. *Francis Nichols*, by his will, charged all his personal estate with debts and legacies; and so much as the personal estate should fall short to answer and pay, he charged all his messuages, lands, and grounds in *Durham*, with payment thereof, in aid of the personal estate, and directed the personal to be sold. By a subsequent clause he gave a particular farm to be sold for payment of his debts and legacies, and by another clause devised all his real estate, so charged and

Ellison v.
Airey,
2 Ves. 568.

chargeable to trustees, to receive and take the first two years profits that should arise and become payable out of his estate in *Durham*, for payment of his debts and legacies, if the personal estate proved deficient. It was insisted that only that particular part, and the two years profits were charged; the generality of the first charge being controuled and restrained thereto expressly.

Lord *Hardwicke*—" Upon all the rules of charging
 " for payment of debts, the whole trust estate is sub-
 " ject to payment of debts and legacies: the charge
 " of the personal estate therewith was unnecessary.
 " Afterwards, there is a full and complete charge on
 " the real of so much as the personal proved not suf-
 " ficient to satisfy. It must be something very strong
 " in the will to restrain that charge to a particular
 " part, to go no further. If it rested on the clause
 " which gives the farm, would the express direction
 " of the will, to sell a particular estate toward pay-
 " ment of those debts and legacies, that the personal
 " estate was not sufficient for, afford a negative im-
 " plication, that no more should be sold? Certainly
 " not; for there are several cases, where there is a
 " charge for payment of debts, and afterwards a
 " direction that a particular part should be sold, that
 " has been taken only to be a declaration that that
 " shall be first applied. Then the subsequent part is
 " no more than what is done by the former clause,
 " taking out a particular part; as one was of the in-
 " heritance, the other the profits. If indeed negative
 " words were added, it cannot go farther; but I take
 " those

“ those negative words, “*and no more,*” to be applied
 “ to the maintenance. There are several cases of a
 “ general charge by words not near so strong as this,
 “ and a devise afterward of a particular estate for that
 “ purpose, yet that was not sufficient to restrain it.
 “ That was the case of *Lord Warrington v. Booth*,
 “ this general charge then subsists; and I cannot
 “ make any other construction.

Vide *Foster*
v. Cook,
 3 Bro. Rep.
 350.

§ 13. *Littleton* says, that where a person had a power by the custom of devising his lands, he might direct that his executors should alien them for a certain sum, to distribute for the good of his soul; and that in cases of this kind, although the lands descended to the heir of the testator, yet the executors might put him out and sell them. From this arose a custom for testators to direct that their executors should sell their lands for payment of their debts, or to devise the lands to their executors for that purpose. In the latter case the lands vest in the executors, but in the former they have only a bare authority.

What Words
 enable Persons
 to sell Lands.
 S. 169.

§ 14. It has been doubted whether a power of sale given to executors be capable of survivorship or transmission. But Mr. *Hargrave* observes that this question is now of little consequence; for such a power though extinct at law, would certainly be enforced in equity, which rightly deeming the purpose, for which the testator directs the money arising from the sale to be applied, to be the substantial part of the devise; and the persons named to execute the power of selling, to be mere trustees, the case falls within the general rule

1 Inst. 113;
 n. 2.

Tit. 12. c. 1. of equity, that a trust shall never fail of execution,
 l. 69. for want of a trustee; and that if one is wanting, the
 court will execute the office.

Tit. 3. l. 8. § 15. It has been stated that where a man devises
 his lands to his executors, for payment of his debts,
 and until his debts are paid, although the determina-
 tion of such an estate be uncertain, yet it is a chattel
 interest, transmissible to their executors.

§ 16. Any words from which it can be inferred to
 have been the intention of the testator that his lands
 should be sold for the payment of his debts, will
 operate as a power of sale.

Newman v. § 17. A person having surrendered his copyhold
 Johnson, lands to the use of his will, devised in these words—
 1 Vern. 45. “ My debts and legacies being first deducted, I devise
 “ all my estate real and personal to J. S.”

Adjudged by Lord *Nottingham* that these words
 amounted to a devise to sell for the payment of
 debts.

Bateman v. § 18. *Robert Bateman* by his will taking notice that
 Bateman, he had surrendered a copyhold to the use of his will,
 1 Atk. 421. directed that the said copyhold should remain, one
 third to his wife for life, and the other two thirds to
 his son, paying to his two daughters 150*l.* a piece at
 twenty-one. But by a latter clause in the will, said,
 provided that if my personal estate, and my house and
 lands at *W.* should not pay my debts, then my exe-
 cutors

utors to raise the same out of my said copyhold premises.

Lord *Hardwicke* said, the question was whether the latter devise would entitle the executors to sell the copyhold estates; and he was of opinion it would, for as the rents were not near enough to discharge the testator's debts, these words would give the trustees a power to sell, to satisfy the testator's intention of paying his debts. It was therefore decreed that the copyhold estate should be sold.

§ 19. *George Lancaster* being seised in fee of some lands, and possessed of others for a term, made his will, and after giving certain legacies proceeded thus—I do hereby charge and make chargeable all and every my lands and inheritance, and leasehold, with the payment of my debts, funeral expences, and legacies; and for more speedily raising money for payment of them, I devise to *G. E.* and *D. Lancaster* (who were his two sons and his daughter) their heirs, executors, and administrators, the leasehold estate (describing it) for all the residue of the term upon trust to sell the same and to apply the money to the payment of his debts, &c. But in case the money arising from the sale of the leasehold estate shall not be sufficient to pay and discharge all his debts, legacies, &c. then he devised—"That his said two sons and daughter should "and might absolutely sell, mortgage, or otherwise "dispose of his freehold estate for the payment of "such of his said debts, &c. as his said leasehold "estate should not be sufficient to discharge."

Lancaster v. Thornton,
2 Burr. 1027.

The leasehold estate was not sufficient to pay the testator's debts, legacies, and funeral expences.

The Lord Keeper directed the following question to be referred to the Court of King's Bench for their opinion, "Whether by virtue of these words, *viz.* in
 " case the money arising from the sale of the leasehold
 " estate shall not be sufficient to pay and discharge all
 " the testator's debts, legacies, and funeral expences,
 " that then he devises that his two sons and his
 " daughter shall and may absolutely sell, mortgage,
 " or otherwise dispose of his freehold estate, for the
 " payment of such of his said debts, legacies, and
 " funeral expences as his said leasehold estate should
 " not be sufficient to pay and discharge; any estate
 " passed to *E. G.* and *D.* his two sons and daughter,
 " or only a power to sell."

Lord *Mansfield*—"Here are *no* words, by which
 " the estate is devised *to* the executors. Therefore,
 " if it be construed that there *is* a devise to them, it
 " must be raised by *implication*. But, by the frame
 " of the will, it is plain that the testator did *not* so
 " intend: for he shews, by the expression he has used,
 " that he *knew* the distinction between the devise of
 " an estate *to* them, and giving them only a power to
 " sell. As to the term "*devise*," the expression "*I*
 " *devise*" is here synonymous to saying, "*I will*,"
 " or "*my mind is*."

"The intention of the testator, Mr. *Ashburst* says,
 " cannot be complied with, in this case, *without* an
 " implication

“ implication of a devise *to* the executors ; because it
 “ must otherwise descend to the heir at law in the
 “ mean time ; who, he says, would not be *chargeable*
 “ with the intermediate rents and profits, but alto-
 “ gether unaccountable for them. That clearly is
 “ not so. The land could only descend to the heir,
 “ subject to the charges ; and would be liable in his
 “ hands to the payment of debts, legacies, and fune-
 “ ral expences ; so that the testator’s intention is
 “ equally answered one way as the other.”

The certificate was as follows—“ Having heard
 “ counsel on both sides, and considered this case, we
 “ are of opinion, that *no estate* passed to the said
 “ *Edmund, George, and Dorothy Lancaster* ; but only
 “ a power to sell, demise, mortgage, or otherwise
 “ dispose of the premises.”

Vide Lingard
 v. Derby,
 1 Bro. R. 311.
 Warneford v.
 Thompson,
 3 Vef. Jun.
 513.

TITLE XXXVIII.

DEVISE.

CHAP. XVII.

Executory Devises.—Devise over after a Devise in Fee Simple.

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| <p>§ 1. <i>Origin of Executory Devises.</i>
 2. <i>Devise over after a Devise in Fee.</i>
 9. <i>Though the First Estate be not vested.</i>
 11. <i>No Devise is deemed Executory which can be supported as a Remainder.</i>
 13. <i>An Executory Devise cannot be barred.</i></p> | <p>16. <i>Within what Time an Executory Devise must vest.</i>
 22. <i>A Devise after a general Failure of Heirs or Issue, is void.</i>
 23. <i>The Words, dying without leaving any Issue, restrained to the Death of the Person.</i>
 26. <i>Curtesy attaches on the First Estate.</i></p> |
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Section 1.

Origin of
Executory
Devises.
Tilbury v.
Barbut,
3 Atk. 617.

IT has been stated, that, by the rules of the common law, no remainder could be limited over after an estate in fee-simple, nor a freehold be created to commence *in futuro*. But the indulgence shewn to testators in effectuating their intentions, however untechnically expressed, induced the judges to dispense with those rules, in cases of wills, as well as in the limitation of uses; and also to allow of certain dispositions of terms for years in wills, which in deeds, deriving their effect from the common law, would be deemed void.

§ 2. Dispositions of this nature are usually called *Executory Devises*, and are of three sorts. The first is, where the devisor disposes of the whole fee, but, upon some future contingency, qualifies that disposition, and devises the estate over to some other person.

Devise over
after a De-
vise in Fee.

§ 3. A testator devised to his mother for life, and, after her death, to his brother in fee; provided that if his wife, who was then enſient, was delivered of a ſon, then the land ſhould remain to him in fee, and died. A ſon was born: and it was held, that the fee of the brother ſhould ceaſe, and veſt in the ſon by way of executory deviſe.

23 Eliz. Dyer
127 a. in mar.

§ 4. A man deviſed to *A.* and his heirs, provided that, if he died within age, then the land ſhould remain to *B.* and his heirs. Adjudged good: for, when the deviſee only takes a limited eſtate, a contingent fee might depend upon it, but that was not by way of remainder, but executory deviſe. And this doctrine was finally eſtabliſhed in the following caſe.

Hoc v.
Gerils,
cited Palm.
136.

§ 5. *William Brown* deviſed lands to *Thomas Brown*, his ſecond ſon, and his heirs for ever; and, if *Thomas* died without iſſue, living *William* his brother, that then *William* his brother ſhould have thoſe lands, to him and his heirs and aſſigns for ever. All the Judges agreed that this was a good limitation of the fee to *William* upon that contingency; not by way of immediate remainder, for they all agreed it could not be by remainder. As, if one deviſe land to *A.* and his heirs, and if he died without heir, that it ſhould remain to

Pells v.
Brown, Cro.
Jac. 590.

another, it was void and repugnant to the estate; for one fee could not be in remainder after another: for the law doth not expect the determination of a fee by his dying without issue, and, therefore, cannot appoint a remainder to begin upon determination thereof. But by way of contingency, or of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed, or in failure of performance thereof, &c. for the one might be, and had always been allowed.

Hanbury v.
Cockerill,
1 Roll. Ab.
835.

§ 6. *A.* having two sons, *B.* and *C.*, by several venters, and being seised of *Blackacre* and *Whiteacre*, devised *Blackacre* in fee to *B.* and *Whiteacre* to *C.* in fee, with a proviso, that if it should please God either of his said sons to die before such time as they should be married, or before they should attain to their age of 21 years, and without issue of their bodies to be begotten, then he gave all the said lands which he had given by his will unto such of his sons as should so decease before his marriage, or before their age of 21, and without issue of their bodies, unto the survivor of his sons. The devise over, in this case, was held good as an executory devise.

Heath v.
Heath,
1 Bro. R. 147.

§ 7. *Edward Heath* devised to his son, *William Heath*, all his estate, till *Edward Heath* should attain his age of 22 years, and no longer. He afterwards said,—“*Item*, I give and bequeath to *Edward Heath* all my messuages in *H.* and *C.* for ever; that is, if he have a son or sons who shall attain 21. But, if my kinsman *Edward Heath* should chance to die without son

son or sons to inherit, my will is, that the son of my son *William Heath* shall inherit." It was determined by Lord *Thurlow*, that *Edward Heath* took an estate in fee, subject to an executory devise over, in the event of his dying without issue, or of his issue dying under the age of 21 years.

§ 8. A person devised a copyhold estate to his daughter, *Susannah Saunders*, and her heirs and assigns for ever: but if his said daughter should happen to die, leaving no child or children, or lawful issue of her body, living at the time of her death, then he gave, devised, and bequeathed all the said copyhold premises to *T. B.* and his heirs. Lord *Eldon*, and the other Judges of the Court of Common Pleas held, that the whole fee being given to *Susannah Saunders*, her heirs and assigns, no further remainders over could be limited upon that fee; and, therefore, the estate given to *T. B.* was a new fee limited upon a contingency, that is, an executory devise.

Doe v. Wetton, 2 Bos. & Pull. 324.

§ 9. Where there is a devise over, after a devise in fee-simple, though such an antecedent devise in fee be not vested, but contingent, yet, if the ulterior devise is limited so as to take effect in defeazance of the estate first devised, on an event subsequent to its becoming vested, it will be deemed an executory devise.

Though the First Estate be not vested.

§ 10. A person devised lands to his wife for life, and, after her death, to such child as she was then supposed to be enſient with, and to the heirs of such child for ever; provided, that if such child as should

happen

Gulliver v. Wicket, 1 Will R. 105.

happen to be born, should die before the age of 21 years, leaving no issue of its body, the reversion should go to another.

Lord Chief Justice *Lee* delivered the opinion of the Court, that the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee, and a devise over, which was good as an executory devise; and, if the contingency of a child never happened, then the last devise was to take effect, upon the death of the wife.

No Devise is deemed Executory, which can be supported as a Remainder.

§ 11. An executory devise being a disposition contrary to the rules established for the construction of conveyances at common law, whenever a future interest in land is so devised, as to fall within the rules laid down for the limitation of contingent remainders, such devise will be construed to be a contingent remainder, and not an executory devise.

§ 12. Thus, where there is a devise over, after a preceding devise to a person and his heirs, if there are any words in the will, by which the first devise can be restrained to mean heirs of the body only, the first estate will be construed to be an estate tail, and the devise over a remainder.

An executory Devise cannot be barred.

§ 13. The essential difference between a contingent remainder and an executory devise, is, that the first may be barred, or prevented from taking effect, by several means. But an executory devise cannot be prevented

vented from taking effect, either by fine or recovery, or by any alteration whatever in the estate, after which it is limited.

§ 14. In the case of *Pells v. Brown, Thomas Brown* Ante f. 5. entered and suffered a recovery ; but all the Judges (except *Doderige*) held, that the recovery did not bar the executory devise ; for the person who suffered the recovery, had a fee, and *William Brown* had but a possibility, if he survived *Thomas* : and, *Thomas* dying without issue in his life, no recovery in value should extend thereto, unless he had been party by way of voucher.

§ 15. A person granted several annuities by deed to his younger children, and, afterwards, devised all his lands to his elder son and his heirs, upon condition that he paid the annuities ; and if he failed of payment, that the younger son should enter and have them. The elder son entered, and made a feoffment, and then the younger son entered for non-payment : and it was held that his entry was lawful, the contingent estate not being divested by the feoffment. Mullinix's Case, cited Palm. 136.

§ 16. In consequence of the rule, that an executory devise cannot be barred, or prevented from taking effect, by any mode whatever, it became necessary to prescribe certain bounds and limits to executory devises ; lest they should be used as a means of creating perpetuities. And, therefore, it was established by analogy to the case of strict entails, that an executory devise must vest within the compass of a life or lives Within what Time an executory Devise must vest. Vide Tit. 32. c. 26. f. 11, 12.
in

in being, and 21 years and nine months after; and the courts have uniformly supported executory devises, that are restrained within these limits.

Ante f. 5.

§ 17. Thus, in the case of *Pells v. Brown*, the event on which the estate was devised over, namely, the death of *Thomas* without issue in the lifetime of *William*, being confined to the life of *William*, was held good.

Fairfax v.
Heron,
Prec. in Cha.
67.

§ 18. A person devised all his lands, after the death of his executor, to *A.* and his heirs for ever; but if he died leaving no son, then to that son or sons of his executor, which he should think fit to nominate. It was decreed, that this was a good executory devise; because the contingency was confined to the period of a life in being.

Taylor v.
Biddall,
2 Mod. 289.

§ 19. *Richard Ben* having a sister formerly married to one *Smith*, by whom she had issue *Augusta Smith*, and afterwards married to one *Wharton*, by whom she had issue a son called *Benjamin*, and a daughter called *Mary*, devised his estate to his sister *Elizabeth*, for so long time, and until her son *Benjamin Wharton* should attain his full age of 21 years, and, after he attained that age, then to the said *Benjamin* and his heirs for ever; and, if he died before his age of 21 years, then to the heirs of the body of *Robert Wharton*, and to their heirs for ever, as they should attain their age of 21 years. *Richard* the testator died; *Benjamin* died before he attained the age of 21, living *Robert* his father; and, afterwards, *Robert* died.

It was determined, that the executory devise to the heirs of the body of *Robert Wharton* was good. Now, the heirs of the body of *Robert Wharton* could not take until after their father's death, for *nemo est hæres viventis* : and since that heir of the body of *Robert*, who should attain 21, might not have been born before his father's death, and the estate could not vest in him until he attained 21, it follows, that the estate might possibly not have vested under that limitation, until 21 years after the determination of a life then in being.

§ 20. Sir *William Stephens* devised freehold estates to his grandson *William Stephens*, his heirs and assigns for ever ; but, in case his said grandson *William Stephens* should die before he attained his age of 21 years, then he gave the same unto his grandson *Thomas Stephens*, his heirs and assigns for ever : but, in case his grandson *Thomas Stephens* should depart this life before he attained his age of 21 years, then he devised the said lands to such other son of the body of his daughter *Mary Stephens*, as should happen to attain the age of 21 years, his heirs and assigns for ever, the elder of such sons to take before the younger, &c. and to the several and respective heirs male of the body of such son and sons, and the heirs male of the body of his and their body and bodies ; and, for default of such issue, he gave the said lands to all and every the daughter and daughters of the said *Mary Stephens* in tail male ; and for want of such issue, he devised the said lands to his brother Sir *Richard Stephens*, his heirs and assigns for ever.

Stephens v. Stephens,
Forr. 228.

The testator died, leaving *William* and *Thomas Stephens* his two grandsons, who both died under age. Soon after the death of the testator, *Mary Stephens* had another son, who attained the age of 21 years; and the question was, whether this executory devise to such unborn son of *Mary Stephens*, as should attain the age of 21 years, was good.

Lord *Talbot* directed a case to be sent to the Court of King's Bench: and the Judges of that Court, Lord *Hardwicke*, Justices *Page*, *Probyn*, and *Lee*, certified their opinion, that they did not find any case, wherein an executory devise of a freehold had been held good, which had suspended the vesting of the estate till a son unborn should attain his age of 21 years, except the case of *Taylor v. Biddall*: and, having caused the record to be searched, they found it to agree in the material parts with the printed report; and, therefore, however unwilling they might be to extend executory devises beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and in conformity to several late determinations in cases of terms for years, and, considering that the power of alienation would not be restrained longer than the law would restrain it, *viz.* during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and that this construction would make the testator's whole disposition take effect, which otherwise would be defeated: they were therefore of opinion, that the devise before mentioned might be good by way of executory devise.

§ 21. In a case, which will be stated hereafter, it was held, that a devise to an infant *in ventre matris*, with a limitation over, upon failure of issue of his body at his death, was good; which begun with an allowance for the birth of a posthumous child, and might also conclude with it.

Long v. Blackall, infra ch. 19.

§ 22. But, where an executory devise is limited on an event, which may not happen within the period above mentioned, as upon a general failure of heirs or issue, it is void: nor is it material, in such cases, how the fact actually turns out: for the possibility, at the creation of such executory limitation, that the event on which its existence depends, may exceed, in point of time, the limits allowed, vitiates it *ab initio*.

A Devise, after a general Failure of Heirs or Issue, is too remote.

§ 23. A devise over, after a devise to a person and his heirs, in case the first devisee shall happen to die leaving no issue behind him, has been held to be good; those words being construed to mean, leaving no issue living at the time of the person's death.

The Words, "dying without leaving any Issue," restrained to the Death of the Person.

§ 24. A person devised a real estate in the following words:—"Item, I give and devise unto my son *P. D.*, his heirs and assigns for ever, all that messuage and tenement wherein I now live. But my will is, that in case my son *P. D.* shall happen to die leaving no issue behind him, then my said wife shall receive and take the rents and profits thereof."

Porter v. Bradley, 3 Term R. 143.

On a case, sent from the Court of Chancery to the Court of King's Bench, one of the questions was,
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what estate *P. D.* took under this will? All the Judges were of opinion, that this case was not to be distinguished in principle from that of *Pells v. Brown*, and certified in the following words :

“ Having heard counsel in the case above referred to us, we are of opinion, that *P. D.* took an estate in fee-simple in the premises above devised to him ; but, as *P. D.* died without issue living at the time of his death, we are of opinion, that the further disposition, made by the testator in that event, is good by way of executory devise.”

Roe v. Jeffery,
7 Term R.
589.

§ 25. A person devised a dwelling-house to his grandson *T. Triswell*, and his heirs for ever : but, in case his said grandson should depart this life and leave no issue, then his will was, that the said dwelling-house, &c. should be and return to *E. M.* and *S.*, or the survivors or survivor of them.

Lord *Kenyon* said, nothing could be clearer in point of law, than that, if an estate be given to *A.* in fee, and, by way of executory devise, an estate be given over, which may take place within a life or lives in being, and 21 years and the fraction of a year afterwards, the latter is good by way of executory devise. The question, therefore, in this and similar cases, was, whether from the whole context of the will it could be collected, that when an estate was given to *A.* and his heirs for ever, but if he died without issue, then over, the testator meant dying without issue living at the death of the first taker. The rule was settled so long

ago

ago as in the reign of *James* the First, in the case of *Pellis v. Brown*; where, the devise being to *Thomas* the second son of the devisor, and his heirs for ever, and if he died without issue, living *William* his brother, then *William* should have those lands to him and his heirs for ever, the limitation over was a good executory devise. That case has never been questioned or shaken, but has been adverted to as an authority in every subsequent case, respecting executory devises: it is considered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the established law of the land, as (it was supposed by the defendant's counsel) we should do, if we decided this case against him. On looking through the whole of this will, we have no doubt but that the testator meant, that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons, to whom it is given over, were then in existence, and life estates only given to them. Now, taking all this into consideration together, it is impossible not to see that the failure of issue, intended by the testator, was to be a failure of issue at the death of the first taker; and, if so, the rule of law is not to be controverted. It is merely a question of intention; and we are all clearly of opinion, that there is no doubt about the testator's intention.

§ 26. In the case of a devise in fee, with an executory devise over, a right to curtesy attaches on the first estate, and is not defeated by the determination of it.

Curtsey attaches on the First Estate.

Buckworth
v. Thirkell,
Collec. Jur.
v. 1 332.

§ 27. *Joseph Sutton* devised to trustees and their heirs, in trust to apply the rents for the maintenance and education of his grand-daughter *Mary Barrs*, till she should arrive at the age of 21 years, or be married; and from and after the said *Mary Barrs* should be married, he gave the said lands to the said *Mary Barrs*, her heirs and assigns for ever. But in case the said *Mary Barrs* should die before she attained the age of 21 years, and without leaving issue, then, from and after the decease of the said *Mary Barrs* as aforesaid, he gave and devised the said estates to his grandson. *Mary Barrs* married *Solomon Hanford*, and had a child which died in her lifetime; and she died soon after, being under the age of 21 years, and without leaving any issue. *Solomon Hanford*, the husband, received the rents of the estate during the coverture in right of his wife. A question was reserved for the opinion of the court on this case, whether *Solomon Hanford* was entitled to be tenant by the curtesy.

Lord *Mansfield* said, the right of tenant by the curtesy existed at the common law, and the necessary points were, that the wife be seised of an estate of inheritance, which, by possibility, might descend to her issue, and that issue should be born. Estates, at common law, were either absolute or conditional: curtesy was incident to both, and existed when the wife died without issue inheritable, which let in the reverter. As to fees conditional, the estate did not become absolute by the birth of a child inheritable; but, in odium of perpetuities, it was for a special purpose become absolute, if issue were born, *i. e.* the donee might alien ;
the

the estate was to descend and revert according to the entail, if not aliened. At common law, the only modification of estates expressly limited was by condition; the statute of uses introduced more qualifications of estates expressly limited. About the reign of *Eliz.* and *Jac.* 1., many cases, in odium of perpetuities, were determined, to prevent and defeat such an application of the statute of uses. The courts leaned against contingent limitations over; but, having gone a great way on that side, they began to think they went too far. New devices were contrived at the time of the troubles, and practised after the Restoration;—trustees to preserve contingent remainders, and executory devises. It is not long that the bounds of them have been settled: it was in my time, that the courts first held they might wait during a life in being, and 21 years after. Now, it is contended, that this is a conditional limitation: it is no such thing; there is no condition in it; it is a contingent limitation. If it is a limitation, it does not defeat the right of the husband to be tenant by the curtesy; the husband may be tenant by the curtesy though the estate is spent. But how was it when she was alive? Here the wife was seised in fee-simple during her life, and such an one as the issue might inherit, if they had not been disappointed by death.

Vide 1 Infl.
241 a. n. 4.

Judgment, that *Solomon Hanford* was entitled to be tenant by the curtesy.

TITLE XXXVIII.

DEVISE.

CHAP. XVIII.

Executory Devise.—*Devise of a Freehold Estate to commence in futuro.*

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|---|---|
| <p>§ 1. <i>Devise of a Freehold Estate to commence in futuro.</i></p> <p>6. <i>Devise of this Sort sometimes supported as Remainders.</i></p> <p>12. <i>A Devise of this Sort must vest within the Time prescribed above.</i></p> <p>17. <i>A Devise, after a general Failure of Heirs or Issue, is too remote.</i></p> | <p>21. <i>Exceptions, 1st, A Devise of a Reversion.</i></p> <p>26. <i>2^d, A Devise in default of Issue of the Devisor.</i></p> <p>28. <i>3^d, A Devise over for Life on failure of Issue of the first Devisee.</i></p> <p>29. <i>4th, Where an Estate Tail is raised by Implication.</i></p> |
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Section 1.

Devise of a
Freehold
Estate to
commence in
futuro.
Ex. Dev. 4th
Ed. 17. 24.

MR. FEARNE defines the second sort of executory devise to be, where the devisor, without departing with the immediate fee, gives a future estate, to arise either upon a contingency, or at a period certain, unprecedented by, or not having the requisite connexion with, any immediate freehold; to give it effect as a remainder.

Pay's Case,
Cro. Eliz.
378.

§ 2. One devised lands to J. S. from *Michaelmas* following, for five years, remainder to the plaintiff and his heirs. The testator died before *Michaelmas*. It was agreed, that it could not vest *eo instanti* that the particular

particular estate determined; because of the term of years. But, being in a will, it was held good as an executory devise.

§ 3. *A.* devised lands to *B.* in fee, to commence and take effect six months after the testator's death. This was adjudged to be a good executory devise.

Clarke v.
Smith,
1 Lutw. 798.

§ 4. A devise to an infant *in ventre matris* is an executory devise of this kind; as it necessarily implies a future disposition, to take effect at the birth of the child. Such a devise was formerly held void; but it was always understood, that a devise to an infant, when he should be born, was good as an executory devise.

1 Freem. 244.
1 Will. R.
206.

Snow v.
Cutler,
1 Lev. 135.

§ 5. Mr. *Fearne* says, that where a particular estate of freehold is first devised, capable in its own nature of supporting a remainder, followed by a limitation not immediately connected with, or commencing from its expiration, as the latter limitation is incapable of taking effect as a remainder, there seems to be no obstacle to its validity, as an executory devise. Therefore, although in the case of a lease for life to *A.* and after the death of *A.* and one day after that the land shall remain to *B.* for life, it seems that the limitation to *B.* is void as a remainder, because not to take effect immediately upon the determination of the first estate: yet, in the case of a similar limitation by will, there appears to be no ground for denying effect to such ulterior limitation, as an executory devise.

Ex. Dev. 21.

Devise of this
Sort some-
times sup-
ported as
remainders.

§ 6. In consequence of the rule already stated, that no devise shall be considered as executory which may be supported as a remainder, several cases have arisen where there has been a devise of a particular estate, with a devise over; in which the devise over has been held to be a remainder, supported by the preceding particular estate.

Purefoy v.
Rogers;
2 Saund. 380.

§ 7. A testator devised to his wife for life, and to her son after the death of his mother, if she should have a son; and, if such son should die within age, then to the right heirs of the devisor. The testator died without issue: his wife married again, and had a son. It was adjudged that the estate limited to that son, was not an executory devise, but a contingent remainder, because the mother had an estate of freehold capable of supporting it.

Doe v. Mor-
gan, *infra*,
f. 11.

§ 8. Wherever the first devise can be construed to pass an estate tail only, the devise over will be deemed a remainder expectant on the determination of that estate tail, and not an executory devise.

Spalding v.
Spalding,
Cro. Car. 185.

§ 9. *John Spalding* having issue three sons, *John*, *Thomas*, and *William*, devised lands to *John* the eldest son and the heirs of his body, after the death of *Alice* the devisor's wife; and, if *John* died living *Alice*, that *William* should be his heir: *John* died leaving a son, in the lifetime of *Alice*. It was determined that the construction of the will should be, that if *John* died *without issue*, living *Alice*, that then *William* his youngest son should have it; and that it should not be construed,

construed, where he limited first to *John* and the heirs of his body, that by this limitation he intended, if he died living *Alice*, that *William* should be his heir, *John* having issue, and thereby to disinherit the heirs of *John's* body.

§ 10. A testator, having charged certain legacies on his lands, devised that in case his son *T.* should happen to die before he married; or, being married, should have no children, then his lands should remain and descend equally to his daughters and their heirs, paying, &c. And in case both his daughters should die without being married; or, being married, should have no children, then he willed that all his estate should descend to his nephew *J. M.* At the end of the will, he gave and devised all his estate, real and personal, not already disposed of by his will, to his son *T.* After the testator's death, his son *T.* entered, and suffered a recovery, and died without issue; upon which his sisters entered, and suffered a recovery, and died without issue; and then the heir of *J. M.* entered. The question was, whether the devise to *J. M.* was a remainder, depending on a particular preceding estate in the son and daughters, or an executory devise.

Wealthy v.
Bosville,
Rep. temp.
Ld. Hardw.
258.

Lord *Hardwicke* said there were two rules, which went a great way in determining the case—First, that no limitation shall be construed to be an executory devise, if it can be made good by way of remainder. Secondly, that it was immaterial in a will, which words came first or last; as the construction must be made

made upon the whole will, and here, in the subsequent part of the will, there was an express devise of all the residue; so that, taking the two clauses together, there was an express devise to the son. And it was given by the word "estate," which was sufficient to carry the fee; so that it amounted to a devise to the son and his heirs, and if he died without issue, remainder, &c. which was an estate tail. But, if that were not so clear, yet as to the daughters no objection could be raised: for there was a devise to them, and if they died without issue, &c. so that their recovery was sufficient to bar the nephew's remainder; and this limitation, being clearly good as a remainder, could not be considered as an executory devise.

Doe ex dem.
Muffell v.
Morgan,
3 Term R.
763.

§ 11. *George Muffell* devised lands to *Elizabeth* his wife for life, remainder to his son *Ebenezer Muffell* for ninety-nine years, if he should so long live; and, after the several deceases of his wife and son, to the heirs of the body of *Ebenezer*. The question was, whether this should be considered as an executory devise or as a contingent remainder.

Hopkins v.
Hopkins,
infra.

Lord *Kenyon*, C. J. said, that if ever there existed a rule respecting executory devises, which had uniformly prevailed without any exception to the contrary, it was that which was laid down by Lord *Hale* in the case of *Purefoy v. Rogers*; that, where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. And therefore his Lordship determined

determined that the devise to the heirs of the body of *Ebenezer* was a contingent remainder; which was originally supported by the estate for life devised to *Elizabeth*, and was defeated by the death of *Elizabeth* before *Ebenezer*.

§ 12. The rules, established for preventing perpetuities, are applied to the second sort of executory devises, as well as to the first. And therefore in all cases, where a freehold estate is devised to commence *in futuro*, it must vest within the compass of a life or lives in being, and twenty-one years and a few months after; otherwise it will be void.

A Devise of this Sort must vest within the Time prescribed above.

§ 13. It should be observed here, that “by the time of vesting,” is meant, the vesting of the freehold. For although land should be limited for a long term of years, with remainder to the unborn son of a person then living, this executory devise to such unborn son would be good; because the vesting of the freehold is confined to the period of a life in being: for upon the birth of such son, the freehold will vest in him; or, upon the death of such person without any son, it must vest somewhere else, subject only in either case to the preceding term.

§ 14. *William Gore* devised certain lands to trustees and their heirs, to the use of the said trustees for five hundred years, upon several trusts; and, from and after the determination of that estate, then to the use of the first and other sons of the testator’s eldest son *Thomas Gore*, in tail male, remainder over. *Thomas Gore*

Gore v. Gore,
2 P. Wms. 28.

2 P. Wms. 63.

Gore had no son when the testator died, but afterwards had a son. The Court of King's Bench was of opinion, that the devise to the eldest son of *Thomas Gore* was void; that it could not be good as a remainder, for want of a freehold to support it; and that it could not take effect as an executory devise, because it was too remote (*viz.*) after five hundred years. But, the case being sent to the Court of King's Bench some years after, Lord *Hardwicke*, Ch. J. together with the Justices *Page*, *Probyn*, and *Lee*, certified their opinion against the opinion of their predecessors:—"That this was a good executory devise, and not too remote; for it must in all events one way or other happen upon the death of *Thomas Gore*, whether he should have a son or not; and either upon the birth of the son, or upon his death without issue, the freehold must vest."

§ 15. Where an estate is devised to a person upon an event, which is too remote; a devise over, depending on the same event, is also void.

Proctor v.
Ep. Bath,
2 H. Black.
358.

§ 16. *Mary Proctor* devised unto the first or other son of her grandson *Thomas Proctor*, that should be bred a clergyman, and be in holy orders, and to his heirs and assigns, all her right of presentation to the rectory of *West Coker*. But, in case her said grandson *Thomas Proctor* should have no such son, then she gave the said presentation unto her grandson *Thomas Moore*, his heirs and assigns for ever. *Thomas Proctor* died without ever having had a son. The question was, whether these devises were good or not.

It was contended that the first devise was void, as being too remote: for *Thomas Proctor* had no son born at the time of the death of the testatrix; and, if he ever should have a son, he would not necessarily be in orders within twenty-one years after his birth. By the canons of the church no person could be admitted into deacon's orders before the age of twenty-three, without a faculty; nor could he be ordained priest before twenty-four. And the devise to *Thomas Moore* was liable to the same objection on account of the remoteness of the contingency, on which it was to take effect; for, supposing there had been no previous devise to the son of *Thomas Proctor*, the devise to *Thomas Moore* would be to him, if *Thomas Proctor* should have no son in orders, but no time was fixed for his taking orders; and such devise, being void in its original creation, could not be made good by the subsequent circumstance of *Thomas Proctor's* having no son; and the devises could not be considered as alternate.

The court were very clearly of opinion that the first devise to the son of *Thomas Proctor* was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to *Moore*, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided, as was the case in *Longhead v. Phelps*: and there was no instance, in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided

6 Bro. Parl.
Ca. 451.
1 Vesl. 134.

cided in the House of Lords, in the case of the Earl of *Chatham v. Tothill* in which the Judges founded their opinion on *Butterfield v. Butterfield*. Consequently the heir at law of the testatrix was entitled.

A Devise, after
a general
Failure of
Heirs or Issue,
is too remote.
Doug. 506 n.

§ 17. In consequence of the rule that an estate, devised to commence *in futuro*, must vest within the period above mentioned, a devise after failure of the issue or heirs of *A.* where no estate tail is already vested or given by the express words of the will, or arises by implication, to such issue or heirs, is void in its creation: for, if *A.* should have heirs or issue, they might last for ever; and, while they did, there would be nobody, who would bar the estate thus devised, so that a perpetuity would be created.

Wright v.
Hammond,
8 Vin. Ab.
110.
1 Stra. 427.

§ 18. *T. C.* being tenant for life, with remainder to his wife for life, remainder to his own right heirs, made his will; in which were these words—"Item, my land at *W.* my wife *Mary* is to enjoy for her life; after her death, it of right goes to my daughter *Elizabeth* for ever, provided she has heirs: but, if my said daughter dies before her mother, or without heirs, and my said wife *Mary* should marry again, and should have heirs male, I bequeath all my said right in *W.* to her heirs male by her second husband." *Mary* the wife died before *Elizabeth* the daughter; but *Mary* had married a second husband, and had issue male: and the question was, whether the devise to them was good. It was resolved, that no estate was devised to the daughter; what was said in the will respecting her being only a declaration how she was to enjoy the estate:

estate: for the testator could not say, “it of right goes to my daughter,” if she claimed under the will. It was therefore a devise after a general failure of heirs of the daughter, which was too remote.

§ 19. Sir *George Lane*, upon the marriage of his son *James Lane*, settled certain lands to the use of himself for life, remainder to his son *James Lane*, for ninety-nine years if he should so long live, remainder to trustees and their heirs during the life of *James*, to support contingent remainders; remainder to the first and other sons of the said *James* by his then intended wife, successively in tail male; remainder to the heirs of the body of *James*; remainder to the right heirs of Sir *George*. The marriage was duly had; and afterwards Sir *George* made his will, and devised the lands comprised in the settlement, on failure of issue of the body of the said *James Lane*, and for want of heirs male of his own body, to his daughter *Frances Lane*, and the heirs of her body. And in a subsequent part of his will he devised that, if his son *James Lane* should die without issue male, and his (the testator's) wife survived him, his said wife should have his house and park at *Rathline* during her life.

Lane v. Fox,
3 Bro. Parl.
Ca. 130.

After the death of Sir *George Lane* (who became Lord *Laneborough*), leaving *James* his only son and heir, and two daughters by his first wife, and the said *Frances Lane* by his second wife; the trustees joined with *James Lane* in making a tenant to the *præcipe*; and a common recovery was suffered of the estates, comprised in the settlement.

James

James Lane, Lord *Laneborough*, died without issue; and *Frances Lane* having married *Henry Fox*, and died, leaving issue *George Fox*, her eldest son, he brought an ejectment for the recovery of the estate. A special verdict was found; and judgment was given in the Courts of Exchequer and Exchequer Chamber for the plaintiff *Fox*. Upon an appeal to the House of Lords of *England*, two questions were put to the Judges—1st, Whether Lord *James* took any other or greater estate by the will, than by the settlement? To which they answered, that Lord *James* could not take any estate tail, no alteration being made by the will; and that no estate was raised to Lord *James* by implication. 2d, Whether, *Frances Lane* took any estate under the will of Lord *George*? To which they answered, that she took no estate whatever; but that the devise to her was absolutely void in its creation, as being on too remote a contingency. Whereupon the judgment was reversed.

Forrest. Rep.
267.

Vide infra.

Goodman v.
Goodright,
1 Blackst. R.
188.
Doug. R. 507.

§ 20. Mrs. *Moslyn*, on the marriage of her niece (and afterwards her heir at law) Mrs. *Wynn* with Dr. *Wynn*, entered into articles, covenanting to settle an estate for life to Mrs. *Wynn*, with remainder to the issue of that marriage in tail; reversion to herself in fee, whenever Dr. *Wynn* should have settled her own estate to the same uses. Mrs. *Moslyn* by her last will, reciting the said articles, gave her equitable reversion in the premises to the heirs of the body of Mrs. *Wynn* by any after-taken husband; and, for want of such issue, remainder over to *Charles Lloyd* in tail. Mrs. *Wynn* died without issue, leaving her husband. It

was

was determined, that this was a future executory devise of the reversion to the heirs of the body of Mrs. *Wynn* by her second husband (during the first marriage) on failure of the heirs of her body by the first; which was too remote, and therefore void.

Habergham v. Vincent,
5 Term R. 92.

§ 21. There are, however, some cases, in which a devise, after a general failure of heirs or issue, is good. First, where a person who is intitled to a reversion expectant on the determination of an estate tail, devises the lands to another, after failure of issue of the tenant in tail; this is held to be an immediate devise of the reversion, and therefore good: for the estate devised commences upon the death of the testator; and the words, which have a future prospect, are used to denote, not the commencement of the estate devised, but the event on which the estate shall take effect in possession, and there can be no danger of a perpetuity; because the reversion thus devised may be barred at any time by a recovery, suffered by the person having the preceding estate tail.

Exceptions.
1st, A Devise
of a Reversion.

§ 22. Thus, where a person conveyed his estate to the use of himself for ninety-nine years, if he should so long live, remainder to his wife in the same manner, remainder to his son *John* in the same manner; remainder to trustees and their heirs during the lives of the father and son, to preserve contingent remainders; remainder to the first and other son of the sons in tail male; remainder to the father in fee. The father made his will: and, after reciting the settlement, devised the lands after the death of his son without issue

Badger v. Lloyd,
1 Ld. Raym.
523.
1 Salk. 232.

male, to another son. It was objected, that the devise was executory ; and, as it could only take effect upon the death of the son without issue, it was void as being too remote. But to this it was answered that here, a man seised of a reversion, expectant on an estate tail, devised it, after the death of the tenant in tail without issue, to another ; this was not an executory, but an immediate devise : and the words “ *from and after,*” were only a declaration, when it should take effect in possession. If the son had not an estate tail in the land but the devises had been after the death of a stranger without issue, they would have been executory devises, and void by reason of the remoteness of the possibility. But here they were limited after the determination of the particular estate.

Fearne,
Ex.Dev. 326.

§ 23. In the case of *Lancsborough v. Fox*, Mr. *Fearne* observes, that the limitation to the daughter was future, to arise after failure of issue of the body of *B.* and of heirs male of the body of *A.* Now, there was no subsisting estate extending to the issue of the body of *B.* (generally), the settlement being confined to his first and other sons in tail male, and the heirs male of his body : nor indeed was there any estate tail in *A.* himself, to extend to the heirs male of his own body, therefore the estate devised to *A.* could not be considered as the devise of a reversion expectant on such preceding estates. And though it should be granted that, as *A.* had but *one son*, and there was a limitation by the settlement to the first and other sons of such son in *tail male*, the devise for want of heirs male of his (*A.*'s) own body, might have

have been construed as a devise of the reversion expectant on failure of the sons of his said son, and the heirs male of their bodies, yet as there was no pre-existing estate extending to issue *female* of the body of *B.* it was impossible to consider the devise on failure of issue (generally) of the body of *B.* as the devise of a reversion, expectant on failure of such issue; there being no preceding estate extending to that period; consequently, unless such a preceding estate was raised by implication, which was not admitted, the devise to *F.* was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and, being not to take effect till after a general failure of issue, was therefore too remote.

§ 24. *A.* upon his intermarriage with *B.* had settled certain lands, &c. in the counties of *M.* and *G.* upon himself for life, remainder to trustees to support contingent remainders, remainder (subject to a jointure rent-charge to his wife) to his first and other sons by the said *B.* successively in tail male, reversion to himself in fee, (subject to the several trust terms usually limited in settlements for securing pin-money and raising portions for younger children and daughters). Afterwards *A.*, having two sons of that marriage, *W.* and *E.*, made his will; and after giving certain specific things to his said wife and two sons, and making a disposition of certain other lands in the said counties which he had purchased since his marriage, proceeded in the words following, *viz.*—"And forasmuch as it
" is my will, intent, and meaning, that in case my
" said two sons now living, or any other son or sons

Jones v.
Morgan,
3 Bro. Par.
Cases 322.

“ of mine lawfully begotten, hereafter to be born,
 “ should die without issue male of their bodies, or of
 “ the body of some or one of them lawfully to be be-
 “ gotten, after their respective decease without issue
 “ male as aforesaid, that then all and singular my
 “ messuages, lands, &c. in the several counties of *M.*
 “ and *G.* not herein before devised, shall be devised
 “ and settled to and for the several uses, &c. herein-
 “ after mentioned, &c. It is therefore my intent and
 “ meaning, that in case my said sons *W.* and *E.*, or
 “ any other son or sons of mine hereafter to be born
 “ as aforesaid, shall happen to die respectively with-
 “ out any issue male of their bodies, or of the body
 “ of some or one of them as aforesaid, and in such
 “ case if it shall so happen, then I give and devise the
 “ remainder of all and singular my messuages, lands,
 “ &c. in the several counties of *M.* and *G.* and not
 “ herein and hereby before devised, and the reversion
 “ and reversions, remainder and remainders of the
 “ same premises to my (said) brother *T.* for and
 “ during the term of his natural life, without im-
 “ peachment of waste; but subject nevertheless to the
 “ several provisos and payments mentioned and con-
 “ tained in my said marriage settlement.” And then
 the testator limits the same lands to trustees during the
 life of *T.* to preserve contingent remainders, remain-
 der to *T. M.* son of *T.* during his life, remainder to
 the first and other sons of *T. M.* with divers remain-
 ders over: and he appointed his wife one of five
 guardians of such of his (the testator’s) children, as
 should be under age at the time of his death, and also
 one of the executors of his will.

The

The testator died, leaving his said wife *B.* and his said two sons and two daughters by her. And one of the questions upon this will was, Whether the said residuary devise over to *T.* and his son, &c. was not void, as being a future limitation not to take effect till after the failure of issue of persons who took no preceding estate, namely of all other sons of *A.* by any future wife: for this limitation to *T.* was not expressed to take effect upon failure of issue male of the testator's sons by his then wife; in which case it would have been good as an immediate devise of the reversion, expectant on the estates in tail male limited to such sons by the settlement; but the words were general and comprehensive, extending in point of expression, as well to the future sons of the testator by any after taken wife, as by his then wife; and, if so, this limitation could not be a devise of the reversion immediately expectant on the estates subsisting or created by the settlement, but was a future devise without any preceding estate to support it: and then, as it could not take effect as a remainder, it could be considered only as an executory devise; in which light it must be void, for it was too remote, as being limited to vest on a general failure of issue.

In support of the devise it was contended, that the testator had not a future marriage in view, or any children not provided for by the settlement; that this appeared from his giving some specific legacies to his wife, naming her one of his executors and one of the guardians of his children. Therefore the words, "*or any other son or sons,*" &c. should be understood as

confined to sons by his then wife ; and, under that construction, the limitation in question would be as good as an immediate devise of the reversion, subject to the estates created by the settlement. Or, that if those words did extend to children by a future marriage, still the limitation in question might be supported, by raising implied estates tail to such children.

Upon a case stated for the Judges of the King's Bench upon this devise, they certified, " That they
 " were of opinion, that the event of a second marriage was not in the testator's contemplation ; but
 " supposing that, from the generality of the description, the words "*any after-born son*" should be
 " extended to the son of any future marriage, they
 " were of opinion, that from the manifest intent of
 " the testator expressly declared in his will, such son
 " must take an estate tail : consequently they were of
 " opinion that, either way, a remainder after estates
 " tail was devised to *T.* who by virtue of the said
 " limitation, upon failure of the sons of the testator
 " without issue male, was entitled to all the lands
 " in the counties of *M.* and *G.* devised by the
 " residuary clause in the said will, for life, with
 " remainder according to the limitations in the said
 " will."

The Lord Chancellor decreed accordingly. He concurred entirely with the opinion certified by the Judges in regard to the event of a future marriage not being in the testator's contemplation ; and consequently

quently that the words, "or any other son or sons," were to be restrained to sons of the first marriage. But as to the raising an estate tail to any sons of a future marriage by implication, he expressed himself inclined to the opinion, that he was bound by the decision of the House of Lords in the case of *Laneborough v. Fox*, as a direct authority against the admitting such implication.

Upon an appeal to the House of Lords from this decree, it was affirmed, agreeably to unanimous opinion of the Judges, founded (as appeared by what was expressed by the Chief Justice of the Common Pleas in delivering their opinion) upon the very same ground to which the Lord Chancellor seemed to think himself confined, *viz.* upon the presumption that the event of a future marriage was not in the testator's contemplation: and that therefore the words, "or if any other son or sons," &c. must be understood of sons of the testator by his then wife.

§ 25. *J. R. Lytton* being an infant entered into articles on his marriage; by which he agreed to settle his estate, after his own decease, to the intent that his intended wife should receive a certain jointure; and subject thereto to the first and other sons of the marriage in tail, remainder to himself in fee. *J. R. Lytton* suffered a recovery, when he came of age, but never made a settlement in pursuance of the articles. Fifteen years after, being in a weak state of health, and his wife living, he made his will; and, having given his wife a rent-charge in satisfaction of the arti-

Lytton
Lytton,
4 Bro. Rep.

cles, he gave and devised his estate, on failure of issue male of his body, to trustees to raise money for the payment of his debts, and subject thereto to his nephew in strict settlement. Lord *Northington* declared, that the devise to the nephew, after a general failure of issue male, was void; the contingency being too remote.

Upon a bill of review Lord *Loughborough* said, that this case did not appear to have been determined after that deliberation, which would give it the sanction due to a decree of Lord *Northington*. The case of *Lanesborough v. Fox* was considered as governing this case; but, when fairly examined, there could not be a greater dissimilitude. Here the testator had had no child for several years; his only child was just dead; the devisee was his next and immediate heir; but he introduced the devise by the words, “in failure of issue male.” Could this mean more than to take in the event, which alone prevented the estate from being the subject of an immediate devise? He certainly had the articles in contemplation: there was no prospect of issue at the time; it was not like Lord *Lanesborough’s* case, who had issue, and might have many more; it would be a harsh construction, that the testator had here the idea of a future issue in contemplation, and an indefinite failure of that issue: he meant to give an immediate estate in possession, at his decease; every clause in the will shewed this intention. It was manifest he had no intention of giving an estate after a general failure of issue. The circumstances of the
testator

testator and his family had always been taken into consideration in these cases.

Decreed, that the declaration made by Lord *Northington* should be reversed.

§ 26. Secondly, a devise in default of issue of the testator's own body has been construed to be a conditional devise to take effect at the death of the testator, and has therefore been held not to be executory; because it must be determined at the instant when the will takes effect, that is, at the death of the testator.

2d, A Devise in default of Issue of the Devisor.

§ 27. On a case sent out of Chancery for the opinion of the Court of King's Bench, the facts were—*Richard Cary*, after directing all his debts to be paid, devised thus,—“*Item, in default of issue of my own body, I give to trustees and their heirs,*” &c. in trust to pay his sister an annuity of 100*l.* till his debts and legacies were paid; and, after payment thereof, to his sister for life with divers remainders over in strict settlement. It was objected that this devise, being after an indefinite failure of issue, was executory and too remote: to which it was answered, that it was not executory, but depended on a precedent condition, upon which the testator intended the whole should take effect. That the words, “in default of issue,” were different from the words “*on failure of issue* :” the one implied that the devisor never should have issue; the other that he should have issue which should afterwards fail. The first contingency must be determined

Willington v. Willington,
1 Black. R.
645.

Trench v. Cadell,
3 Bro. Parl. Ca. 257.

mined at his own death ; the latter might be suspended for ages. The court certified that the trustees took a base fee, determinable on the payment of the testator's debts and legacies out of the profits of the estate ; and (as Sir *William Blackstone* conceived) principally upon the idea of the will's being merely conditional, in case he left no issue of his body.

3d, A Devise
over for Life
on failure of
Issue of the
first Devisee.
Fearne Ex.
Dev. 279.
Doe v. Lyde,
infra ch. 19.

§ 28. An executory devise over for life to a person *in esse*, to take place after a dying without issue of the first devisee, may be good ; because, the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all : and therefore the failure of issue, in that case, is confined to the compass of a life in being.

4th, Where
an Estate Tail
is raised by
Implication.

§ 29. There are also several cases, in which the courts have supported a devise over, after a general failure of heirs or issue, by raising an estate tail by implication in the person, on the failure of whose heirs or issue the estate is devised over : for in that case the second devise is supported as a remainder, expectant on the determination of such prior estate tail.

Ante ch. 12.

§ 30. In the case of *Walter v. Drew*, which has been already stated, the court having held that *Richard*, the testator's eldest son, took an estate tail by implication ; it followed that the devise over to the *William* was good as a remainder.

§ 31. In

§ 31. In the case of *Jones v. Morgan*, the Judges of the King's Bench appear from their certificate to have been of opinion, that, if a second marriage was in the contemplation of the testator, then an estate tail was raised by implication to the sons of that marriage; and therefore that the devise over was good, as a remainder expectant on the determination of that estate tail. Ante f. 24.

TITLE XXXVIII,

D E V I S E.

CHAP. XIX.

Executory Devises of Terms for Years.

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| <p>§ 1. <i>A Bequest over of a Term for Years was formerly void.</i></p> <p>2. <i>But such a Bequest is now good.</i></p> <p>5. <i>And also a similar Declaration of Trust of a Term.</i></p> <p>6. <i>Though to a Person not in esse, or not ascertained.</i></p> <p>9. <i>The Devisee for Life cannot bar the Devise over.</i></p> <p>12. <i>Within what Time an Executory Bequest of a Term must vest.</i></p> <p>13. <i>Where limited after a general Failure of Issue, is void.</i></p> <p>16. <i>Such Limitations cannot be supported as Remainders.</i></p> | <p>§ 17. <i>Where the Failure of Issue is confined to a Life or Lives in being, &c. it is good.</i></p> <p>23. <i>The Words, dying without Issue, sometimes restrained to the Death of a Person in esse.</i></p> <p>29. <i>No Distinction between Words giving an express Estate Tail, or by Implication.</i></p> <p>31. <i>Nor between a Devise for Life and an indefinite Devise.</i></p> <p>33. <i>An Executory Devise for Life after a general Failure of Issue, is good.</i></p> |
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Section 1.

A Bequest
over of a
Term for
Years was
formerly void.
1 Bur. 284.

UPON the first introduction of long terms for years, it was held, that if a term for years was given to a person for life, with a remainder over, the bequest of the remainder was void; because an estate for life being of greater estimation in the eye of the law than the longest term for years, it was concluded, that the limitation of a term for years, to a person for life, was a complete disposition of it; and, therefore, nothing remained

mained to be given over. Another reason for this doctrine was, that the possibility of a term's continuing longer than the life of the person, to whom it was first bequeathed, was not such an interest as by the rules of law could be limited over.

§ 2. When long and beneficial terms came in use, the convenience of families required, that they might be settled in the same manner as freehold estates. And, in a case, which arose in 19 *Eliz.*, the Judges determined, that a bequest of the residue of a term for years, after a previous disposition for life, was good.

But such a Bequest is now good.

§ 3. *Edward Manning*, being possessed of the moiety of a farm and mill for the term of 50 years, devised his indenture of lease of the farm and mill, and all the years therein to come, to *Matthew Manning*, after the death of *Mary Manning* his wife, (which farm and mill his will was, that *Mary Manning* his wife should enjoy during her life), conditionally, that the said *M. Manning* should not devise, sell, or give the said lease, but leave it wholly to *John* his son, &c. It was resolved, that this devise to *Matthew Manning* was good, not by way of remainder, but by way of executory devise.

Matthew Manning's Case, 8 Rep. 95.

§ 4. *John Morrice*, being possessed of a house for the term of 5000 years, devised it to *John Morrice* his father for the term of the natural life of the said *John Morrice*, and, after his decease, the remainder of the said

Lampet's Case, 10 Rep. 46.

saïd house to *Elizabeth* the sister of the testator, and to the heirs of the body of the saïd *Elizabeth*.

Upon the question, whether this executory devise after the death of *John Morrice* was good, when the term itself, and not the use or occupation of it for life, was devised to the first devisee for life : it was resolved, that in such case also the executory devise over was good.

And also a
similar De-
claration of
Trust of a
Term.
1 Bur. 284.

§ 5. The same necessity, which induced the Judges to allow of executory bequests of terms for years, required, that similar limitations might be allowed in deeds, by which the trusts of terms were declared : and, therefore, says Lord *Mansfield*, to get out of the literal authority of old cases, an ingenious distinction was invented ; a remainder might be limited for the residue of the years, but not for the residue of the term. And, in the reign of *Charles 2.*, it was settled, that the limitation of the trust of a term should be governed and guided by the same rules in equity, as the devise of a term was, at law ; and that such limitations as would be good in one case, would be so in the other, *et à converso*.

1 Vern. 235.

Though to a
Person not
in esse, or not
ascertained.

§ 6. Where the person, to whom a term for years is limited over, after a previous disposition of it to another for life, is not *in esse*, or not ascertained, still the limitation over will be good.

Cotton v.
Heath,
1 Roll. Ab.
612. 1 Ab.
Eq. 191.

§ 7. A termor for years devised the term to his wife for 18 years, and after to his eldest son for life,
and

and after to the eldest issue male of that son for life. It was held, that although the son had not any issue male at the time of the devise and death of the testator, yet that, if he had issue male at his death, such issue male should have it as an executory devise: for that, notwithstanding its being a contingency upon a contingency, and the issue not being *in esse* at the time of the devise, yet, inasmuch as it was limited to the son but for life, it was good, and all one with *Manning's* case.

§ 8. Although a devise of a term for years to a person and the heirs of his body vests the entire and absolute property of the term in him, if not restrained by subsequent words, yet, if a devise over of it is made, which is within the rules established for preventing perpetuities, it will be supported as an executory devise.

§ 9. It was resolved in *Manning's* case, and also in *Lampet's* case, that in devises of this sort, after the executor has assented to the first devise, it is not in the power of the first devisee to bar the limitation over: nor will any subsequent union of the freehold or inheritance, with the interest so given to the first devisee, or a feoffment, or other act of forfeiture, by such first devisee, extinguish or affect the interest of the ulterior devisee.

The Devisee for Life cannot bar the Devise over.

Fearne Ex. Dev. 55.

§ 10. *W.*, possessed of a house for a term of years, devised the profits thereof to *J.* during the time she should continue sole; and then devised the term to *R.* and

Hamington v. Rudyard, cited 10 Rep. 53 a.

and died. J. entered by assent of the executor, and afterwards purchased the fee.

It was resolved that, although the whole term was in J. *quousque*, &c. so that, by the purchase of the fee-simple, *her* interest became extinct, yet the same did not defeat the executory devise to R.; but that, after the marriage of J., and not before, he might enter †.

Ante f. 7.

§ 11. In the case of *Cotton v. Heath*, the eldest son, to whom the term was devised for life, made a feoffment of the lands, whereupon the reversioner in fee entered for the forfeiture; and it was decreed, that the feoffment and entry for the forfeiture did not destroy the executory bequest.

Within what Time an executory Bequest of a Term must vest.

§ 12. When it was settled that an executory bequest of a term for years could not be barred, it became necessary to apply the same rule to this kind of limitation, as to executory devises of estates of inheritance; namely, that it should vest within the compass of a life or lives in being, and 21 years and some months after.

Where limited after a general Failure of Issue, is void.

§ 13. In consequence of this principle, it has been long settled, that, where a term for years is given over, after a general and indefinite failure of heirs or issue, it is void, as being too remote.

† A distinction, was formerly made between a devise of a *term*, and a devise of the *land*, which is now exploded.

§ 14. A lessee, for 1000 years, without impeachment of waste, devised to *L.*; and, if he died without issue, then to *B.* The court held that the devise over was void; and that the whole vested in *L.*, his executors and administrators.

Burford v.
Lee, 2 Freem.
210.

§ 15. A person devised a term for years to his wife for life; and, after her decease, to *Nicholas* his son for life; and, if *Nicholas* his son should die without issue of his body begotten, then he devised it over to *Barnaby*. The whole court was unanimously of opinion, that the remainder to *Barnaby* was void: for that, as he could not take until the death of *Nicholas* without issue, it was the same in effect as if it had been to *Nicholas* and the heirs of his body, with remainder to *Barnaby*; which devise would have been clearly bad, because, after a *term* is devised to one and the heirs of his body, no other limitation, nor any appointment of it by way of *executory devise*, can be made; for the law will not presume any *term* to have continuance, so long as issue of the body may continue; and, therefore, a limitation in this respect, after an indefinite failure of issue, depends upon too remote a possibility.

Love v.
Windham,
1 Mod. 50.

It was certified accordingly to the Court of Chancery, that *Barnaby* the plaintiff had no title.

§ 16. In cases of this kind, the bequest over cannot be supported as a remainder, by raising an estate tail in the first taker; because a term for years cannot be intailed: nor can a remainder over be limited of a term, after a disposition of it to a person and the heirs

Such Limitations cannot be supported as Remainders.
Tit. 8. c. 2.
f. 18.

of his body ; because such a disposition gives the entire and absolute property of the term, so that nothing remains to be given over.

Where the Failure of Issue is confined to a Life or Lives in being, &c. it is good.

§ 17. If a term for years is given over, upon a failure of issue or heirs, and there are words to restrain the failure of such issue within the compass of a life or lives in being, and 21 years and some months after, the bequest will be good, as being within the rules established by the courts for preventing perpetuities. This doctrine was first laid down in the case of a declaration of trust of a term by deed ; but, as executory devises and declarations of trust of terms for years are governed by the same rules, that, and all the other cases, respecting declarations of trust of terms for years, will be stated in this chapter.

Duke of Norfolk's Case, 3 Ch. Ca. 1. Pollexf. 223.

§ 18. The trusts of a term of 500 years were declared to *Henry Howard* (second son of the Earl of *Arundel*) and the heirs male of his body, so long as *Thomas Lord Maltravers*, eldest son of the Earl of *Arundel*, or any issue male of his body should be living. But, in case *Thomas Lord Maltravers* should die without issue male *in the lifetime of Henry Howard*, not leaving his wife enſient of a son, or in case, after the death of *Thomas Lord Maltravers* without issue male, the Earldom of *Arundel* should descend to *Henry Howard*, then the said *Henry Howard* and his issue to have no benefit of this term, but it should go over to *Charles Howard* the next brother.

Thomas Lord Maltravers became Duke of *Norfolk*, and died without issue, having never been married, whereby the Earldom of *Arundel* descended on *Henry Howard*: and the plaintiff *Charles Howard* claimed this term under the limitation to him.

This cause was heard before Lord Chancellor *Nottingham*, assisted by Lord Chief Baron *Montague*, and the Chief Justices *North* and *Pemberton*.

The Two Chief Justices and the Chief Baron agreed, that the limitations of trusts of terms, and executory devises of terms, ought to be governed by the same rules; that no limitation over of a term for years after an estate tail, had ever been permitted; that, as no direct remainder could be limited over in such a case, so, neither could a contingent remainder be limited over, although the event on which it was limited should happen ever so soon; that the case of *Child v. Bayley* was a positive authority against the validity of a limitation of this kind, the admission of which would be productive of perpetuities; and, therefore, they were unanimously of opinion, that the limitation over to *Charles Howard* was void. Infra.

Lord Chancellor *Nottingham*.—The great objection, which has been made to the validity of this limitation, is, that it tends to a perpetuity. A perpetuity is the settlement of an estate or interest in tail, with such remainders expectant on it, as are not in the power of the tenant in tail to dock, by any means whatsoever; but must continue as perpetual clogs on the estate.

But future interests, springing trusts, or trusts executory, and remainders which are to arise upon contingencies, are quite out of the rules and reason of perpetuities, if they are limited on events which must soon happen. No principle of law has been oftener laid down than this, that there can be no remainder of a freehold estate limited after a fee-simple; yet the nature of things, and the commerce between man and man, have induced the Judges to relax this rule, and allow of executory fees, in devises and conveyances to uses. But it is said, that a lease for years, which is but a chattel, will not bear a contingent limitation, on account of its meanness: as to this point, the difference between a chattel and an inheritance is a difference only in words, and not in reason; for the owner of a lease has as absolute a power over it, as a person, who is seised in fee, has over the inheritance. If a springing trust of a term is not allowed, as well as a springing use of an inheritance, men possessed of terms for years will not be capable of making that provision for their families, which the laws of every country ought to support.

Suppose a man, possessed of no other property than a long term for years, should, on the marriage of his son, assign this term to trustees, in trust for himself and his executors, until the marriage takes effect, and from the solemnization of the marriage, to the son for life, remainder to his wife for life, &c.; surely this would not be a void limitation in a marriage settlement: and, if this springing trust to arise on the contingency of a marriage be good, why should not the springing trust

in

in the present case be equally good? If the estate had been limited to *Henry Howard*, and the heirs male of his body, until the death of *Thomas Lord Maltravers* without issue, generally, and then to *Charles*, the limitation would certainly have been void: but the addition of the words, “*if Thomas Lord Maltravers die without issue in the lifetime of Henry,*” entirely alters the case, as the event, on which the term is limited over, is thereby circumscribed to the period of a life then in being: and, as a chattel interest will bear a remainder over where there is no danger of a perpetuity, it must, of course, bear a remainder over upon a contingency, which must inevitably happen during the existence of a life in being.

The principal authority against the plaintiff in this cause, is the case of *Child v. Bayley*: this case is variously reported; the true state of it is this: A term of 76 years was devised by a person to his wife for life, then to his son *William* and his assigns for all the rest of the term; provided that, if *William* died without issue *then living*, the term should go over to *Thomas*, which I agree to be the same as the present case. The remainder to *Thomas* was held to be void in its creation; but the resolution, in that case, went upon several reasons, which are not to be found in this case; and besides, that case has been contradicted since. In the case of *Wood v. Saunders*, the trust of a long term was limited to the father for 60 years, if he should so long live, then to the mother in the same manner, then to *John* the son and his executors if he survived his father and mother; and if he died in their lifetime

Cro. Ja. 459.

Pollexf. 35.

having issue, then to his issue; but if he died in the lifetime of his father and mother without issue, then remainder over to his brother. *John* died without issue in the lifetime of his father and mother: and the question was, whether the limitation over to *Edward* was good?

It was resolved by Lord Keeper *Bridgeman*, assisted by *Twisden* and *Rainsford* Justices, that the limitation over to *Edward* was good; as the contingency, on which it was to take place, must happen during the existence of two lives then in being. Thus we see, that Sir *Orlando Bridgeman*, who drew the deeds in the present case, continued of the same opinion that he was of when a conveyancer.

It was decreed, that the limitation over to *Charles Howard* was good.

Lamb v.
Archer,
1 Salk. 225.

§ 19. Upon a special verdict, the case was this:—*H.*, possessed of a term for years, devised his land to *A.*, and the heirs of his body; and, if *A.* died without issue living *B.*, then to *B.* The court held this was a good limitation to *B.*, the contingency arising within the compass of a life.

Fletcher's
Case, 1 Ab.
Eq. 193.

§ 20. A person devised a term for years to his wife for life, and, after her death, to *B. F.* for her life, and after her death, to *T. F.* and his children; and then devised in this manner: “And, if it shall happen that the said *T. F.* do die before the expiration of the said term, not having issue of his body then living,” then

to

to go over to the plaintiffs for the residue of the term. This bequest was held good, the failure of issue being confined to the life of *T. F.*

§ 21. A case, sent from the Court of Chancery, for the opinion of the Judges of the Court of King's Bench, stated that *George Blackall*, being possessed of a term for years, devised it, after the death of his wife, to the child, with which the testator's wife was then *ensient*, in case it should be a son, during his life; and, after his decease, then to such issue male, or the descendants of such issue male of such child, as at the time of his death should be his heir at law; and, in case at the time of the death of such child, there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then he bequeathed the same to *Philippa Long*, her executors, &c.

Long v. Blackall,
7 Term R.
100.

The wife of the testator was *ensient* at the time of making the will, and when the testator died; and had a son, who died without issue. The question directed by the Chancellor was, whether the limitation to *Philippa* was good?

Lord *Kenyon* Chief Justice.—The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the courts have said, that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements, the estate may be limited to the

first and other sons of the marriage in tail, and, until the person to whom the last remainder is limited is of age, the estate is unalienable. In conformity to that rule, courts of law have said, so far we will allow executory devises to be good. To support this decision, I could refer to many decisions: but it is sufficient to refer to the Duke of *Norfolk's* case, in which all the learning on this head was gone into; and from that time to the present, every judge has acquiesced in that decision. It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and 21 years and the fraction of another year, allowing for the time of gestation.

Mr. Justice *Lawrence*.—The devise over, in this case, must take effect, if at all, after a life which must be in being within nine months after the devisor's death.

The Judges certified, that the limitation to *Philippa* was good.

§ 22. It is observable, that this case began with a devise to a posthumous child for life, with a limitation over, upon failure of issue of his body at his death; which, of course, would include an heir male then *in ventre sa mere*: for, as the devise began with the allowance for the birth of a posthumous child, and also might conclude with it, the time might be claimed twice over; and so the time allowed for the birth of a posthumous child, after lives in being and 21 years, might be enlarged to two periods of gestation. But the determination

nation has been confirmed, after great deliberation, in a subsequent case, which will be stated hereafter.

Thellusson v. Thellusson,
infra c. 20.

§ 23. In the case of executory bequests of terms for years, the Court of Chancery has very much inclined to lay hold of any words in a will, to restrain the generality of the words “dying without issue,” and confine them to dying without issue living at the time of the person’s decease, in order to support the intention of the testator: for, by this construction, the devise over becomes valid, being confined to the period of a life in being.

The Words,
“dying without issue,”
sometimes restrained to
Death of a
Person *in esse*.

§ 24. One possessed of a term for years, devised it, by his will, to his son *Henry* for life, and no longer; and, after his decease, to such of the issue of the said *Henry*, as *Henry* by his will should appoint: and in case *Henry* should die without issue, the testator devised the same to his brother *Albinus*, for the residue of the term, and died. *Henry* died without issue living at his death: whereupon, the question was, whether the term should go to the executors of the first testator, or to the executors of *Henry*, or to *Albinus*.

Target v. Gaunt, 1 P.
Wms. 432.

It was objected, that the devise over of a term, upon a dying without issue, was void; being too remote an expectancy, and tending to a perpetuity.

Lord Chancellor *Parker* held, that the expression, “dying without issue,” had two senses. 1st, A legal sense, and that was, whenever there was a failure of issue: and if the will, in this case, was to be taken in a vulgar

a vulgar sense, viz. if *Henry* died without leaving issue at the time of his death, then the devise over to *Albinus* was good. Now, this seemed to be the meaning of the testator : for it must be intended such issue as he should, or at least might, appoint the term to, which must be intended issue then living ; and this construction should be more favoured, as it supported the will, whereas the other destroyed it. Therefore, the court held, that the devise over of the term to *Albinus* was good ; and observed, that there was a great diversity between a devise of a freehold estate to *A.* for life, and if *A.* dies without issue, then to *B.*, and a devise of a term in the same words : for, in the former case, this might give *A.* an estate tail, because the words, “ if *A.* die without issue,” in case of an inheritance, are inserted in favour of the issue, to let them in after the death of the father ; but in case of a term, these words cannot have that effect, for the father takes the whole, which, on his death, will not go to his issue, but to his executors.

Forth v.
Chapman,
1 P.Wm. 663.

§ 25. A term for years was devised to *William Gore* and *Walter Gore*, and, if either of his nephews *William* or *Walter* should depart this life and leave no issue of their respective bodies, then he gave the said leasehold premises to the daughter of his brother *William Gore*, &c.

The Master of the Rolls was of opinion, that the devise over was void ; and said that, had the words been, if *A.* or *B.* should die without issue, remainder
over,

over, this plainly would have been void, and exactly the case of *Love v. Windham*.

Ante f. 15.

On an appeal to Lord Chancellor *Parker*, the decree was reversed : and his Lordship said, if a term was devised to *A.*, and if *A.* die without leaving issue, remainder over, in the vulgar and natural sense this must be intended, if *A.* died without leaving issue at his death, and then the devise over is good ; that the word “ *die* ” being the last antecedent, the words, “ *without leaving issue,* ” must refer to that. Besides, the testator, who is *inops consilii*, will, under such circumstances, be supposed to speak in the vulgar, common, and natural, not in the legal sense.

His Lordship likewise took notice, that in a *formedon* in remainder, where a tenant in tail leaves issue, which issue afterwards dies without issue, whereupon such writ is brought, the *formedon* says that the tenant in tail died leaving issue *J. S.*, which *J. S.* died afterwards without issue, and so the first donee in tail died without issue, thus the pleading says, that the donee in tail died leaving issue at his death, consequently the words, *leaving issue*, refer to the time of the death of the tenant in tail ; and if the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say the court should take the will in the most uncommon meaning, to destroy the will.

He said, the reason why a devise of a freehold to one for life, and if he die without issue, then to another,
is

is determined to be an estate tail; is in favour of the issue, that such may have it, and the intent takes place. But that there is the plainest difference between a devise of a freehold and a devise of a term for years; for, in a devise of the latter to one, and if he die without issue, then to another, the words, “*if he die without issue*,” cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it.

Atkinson v.
Hutchinson,
3 P. Wm. 258.

§ 26. *Edward Baxter*, being possessed of a term for 40 years, devised it to trustees, in trust for the testator's wife for life; and, after her death, to the use of such children as the testator should leave at the time of his death; and, in case all his said children should die without leaving any issue, then to the use of *John Hutchinson*.

Lord Chancellor *Talbot* said, where words are capable of a twofold construction, even in the case of a deed, and much more in that of a will, it was just and reasonable that such construction should be received, as tended to make it good. And, in this case, the devise of the term to the testator's children, and if they should die without issue then to *Hutchinson*, might easily and naturally be understood to signify, if they died without leaving any issue at the time of their death; nay, much more naturally than in the other case, viz. if there should be a failure of issue of them a hundred years after. He cited the cases of *Target v. Gaunt*, and *Forth v. Chapman*, and decreed in favour of the devise over, viz. that the words, “*if the first devisee*”
“*died*”

“died without leaving any issue,” must be understood to mean without leaving issue at his death.

§ 27. A person, possessed of lands for a term of years, gave them to his grandson *T. B. Peake*, son of *D.* and *Sarah Peake*, and the heirs lawful of him for ever. But, in case he should happen to die and leave no lawful heir, then, and in that case, he gave them, after the death of the said *T. B. Peake*, to the next eldest son or heir of the said *D. Peake* and *Sarah* his wife, &c. *T. B. Peake* took possession of the leasehold estate in question under the will, and died without issue.

Goodtitle v. Pagden,
2 Term R.
720.

Lord *Kenyon* said that, on conference with the rest of the Court, they were clearly of opinion, that the limitation over was good. This was a chattel interest limited to *T. B. Peake* and the heirs lawful of him for ever; but in case he should happen to die, and leave no lawful heir, then over, &c. Now, it was apparent on the will, that the testator, by “lawful heirs,” meant “heirs of the body;” and, leaving no lawful heir, must be confined to leaving no issue at the time of his death.

§ 28. The following case was sent by the Master of the Rolls, for the opinion of the Court of King’s Bench. A person devised a leasehold house to his wife, *Mary Parker*, during the term of her natural life, and, after her decease, to go to his son *S. Parker* and to the heirs of his body lawfully begotten, and their heirs and assigns for ever; but, in default of such issue, then

Wilkinson v. South,
7 Term R.
555.

then to go to his (the testator's) grandson *T. Wilkinson*, his heirs and assigns for ever. *S. Parker* entered on the estate upon the death of the testator, (*Mary Parker* being then dead), and died without ever having had any issue. And the question was, whether *T. Wilkinson* took any thing under the will?

Lord *Kenyon*.—We will send our certificate in this case; but I will now state the short ground on which my opinion is founded.

The only question is, whether, on the fair construction of the words of this will, the testator meant that the limitation over to *T. Wilkinson*, the plaintiff, should only take effect after an indefinite failure of issue in *S. Parker*, or on a failure of issue living at the time of the death of *S. Parker*; for, as soon as that intention is discovered, there is an end of the case. If personal property be so limited that, if it were an estate of inheritance, it would give an estate tail, the absolute interest vests in the first taker. But if the limitation be with a double aspect, to *A.* and to the issue of his body, if there be any such issue living at his death, if not, then over, it is a good limitation. It was so settled in *Sabbarton v. Sabbarton*, and a variety of other cases, some of which are not in print. Here the words of the will are, “to *S. Parker* and the heirs of his body, and to their heirs and assigns for ever:” if those words stood uncontrolled by any thing subsequent in the will, the absolute interest would have vested in him; but other words are added, “but in default of such issue, then after his decease to go to the testator’s

“tor’s grandson.” There is a case in the books to shew, that *then* and *when* are adverbs of time. Then, at what time was the estate to go over to the testator’s grandson? At the death of *S. Parker*, if he left no issue: there is nothing in the will to shew, that the testator intended that the limitation over should not take effect until future generations; but, on the contrary, there is sufficient to shew that he intended, that the estate should, in one event, vest in the grandson at the time of *S. Parker*’s death; and that is within the time which the law allows in the case of executory devises. The rule respecting executory devises is extremely well settled: and a limitation, by way of executory devise, is good, if it may take place after a life or lives in being, and within 21 years and the fraction of another year afterwards. As I before observed, this is a question of intention; and I am clearly of opinion, that the testator’s intention was, that if *S. Parker* did not leave any issue at his death, the subsequent limitation should take effect.

The Court certified, that *T. Wilkinson* was entitled, under the will of *E. Parker*, to the absolute and entire interest in the leasehold premises above mentioned.

§ 29. Mr. *Fearne* says, that a diversity has in some cases been contended for, between a limitation of a term by such words as, in the case of a real estate, would give an express estate tail; and a limitation of the same by such words as, in the case of a real estate, would only give an estate tail by implication, upon this principle, that where the words of a will, if used with regard to inheritance, would give an express estate tail, there the same words ap-

plied

No Distinction between Words giving an express Estate Tail or by Implication.

1 P. Wm. 433.
3 — 268.

plied to a term, will pass the whole interest in that term: but that, where the words of the will, if applied to the freehold, would give an estate tail by implication only, there they will not enure to give the whole interest in that term. And, consequently, that where a term is limited to one, and if he die without issue, remainder over, this limitation will not vest the whole term in him, as a limitation to the heirs of his body, or to his issue, would do; but are always to be understood restrictively, and to relate only to his dying without issue living at his death, and, therefore, give him the term only during his life.

§ 30. The ground of the distinction is this; in respect to an inheritance, the words, dying without issue, are taken to mean an indefinite failure of issue, in order to create an estate tail in favour of the issue, who are capable of taking an inheritance; but, with respect to a term, such a construction cannot benefit the issue, because a term cannot descend to them. In some instances, the Court seems to have countenanced a distinction of this sort; but in all those cases, there were some circumstances in the will, which the Court observed, confined the generality of the expression, dying without issue, to dying without issue then living. But it has been frequently determined, that the limitation of a term over, after a dying without issue, even in such cases where the limitation could only have given an estate tail by implication in a real estate, is to be taken in the legal extent of the expression; and, therefore, the limitation over being in that sense too remote, is utterly void.

1 P.Wm. 667.

Vide Fearn
Ex.Dev. 233.

§ 31. It is the same thing, whether the devise of a term be to one for life expressly, and if he die without issue, remainder over, or to one indefinitely, and if he die without issue, remainder over. Thus, in the case of *Love v. Windham*, the devise was to one for life expressly, and if he die without issue, remainder over, and yet the remainder was held void.

Nor between a Devise for Life and an indefinite Devise.

Ante.

§ 32. *William Clare*, possessed of a long term, devised it to trustees, in trust for his son *Thomas Clare*, for so many years of the term as he should live, and after his death, in trust for the issue male of his son *Thomas* lawfully begotten, for so many years of the said unexpired term as such issue male should live; and when the issue male of his said son *Thomas* should happen to be extinct, then in trust for his second son in the same manner. The question was, whether the limitation over to *William* the second son, after failure of issue male of *Thomas*, was not void.

Clare v. Clare,
Forrest R. 21.

Lord *Talbot* held, that the subsequent limitation to the issue of *Thomas*, did not enlarge the express estate for life given to him: but he also held, that the remainder over upon the extinction of issue male, which was equivalent to a dying without issue, when taken as an indefinite failure of issue, was void.

Vide *Fearne*
Ex Dev. 275.

§ 33. An executory devise of a term for life to a person *in esse*, to take place upon a dying without issue of another, may be good; because the future limitation being only for the life of a person *in esse*, it must necessarily take place during that life, or not at all: and,

An Executory Devise for Life after a general Failure of Issue, is good.

therefore, the failure of issue is, in that case, confined to the compass of a life in being.

Oakes v.
Chalfont,
Pollex. 38.

§ 34. *William Wilson*, possessed of a term, assigned the same to trustees, in trust that he should receive the profits during his life, and, after his death, for *Mary* his wife during her life, and after her death, that *John Oates* should receive a moiety of the profits during his life, and, after his decease, his child or children during his, her, and their lives; and for want of such issue, or after the decease of the child or children of *Edward Oakes*, to permit *Sarah Chalfont* to receive the profits during her life. The question was, whether the limitation to *Sarah Chalfont* was good. And the Lord Keeper declared that the trust, being expressly limited for life, the same did not tend to a perpetuity, and, therefore, was good.

3 Ark. 449.
Doe v. Lyde,
1 Term R.

593.

TITLE XXXVIII.

D E V I S E.

CHAP. XX.

Other Matters relating to Executory Devises.

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| <p>§ 1. <i>Where one Limitation is Executory, all the subsequent ones are so likewise.</i></p> <p>5. <i>A preceding Executory Limitation may be uncertain, when a subsequent one may be certain.</i></p> <p>11. <i>A preceding Executory Limitation is not a Condition precedent.</i></p> <p>17. <i>Limitations over after an Executory Devise of the whole Interest sometimes good.</i></p> <p>22. <i>Distinction between the Cases where a subsequent Limitation may become good, and where not.</i></p> <p>24. <i>A Limitation which was originally a Contingent Re-</i></p> | <p><i>mainder may take Effect as an Executory Devise.</i></p> <p>29. <i>Distinction between Executory Devises per verba de presenti, and, per verba de futuro.</i></p> <p>34. <i>The Freehold descends in the mean Time to the Heir.</i></p> <p>37. <i>And also the intermediate Profits.</i></p> <p>40. <i>A Devise of the Residue will pass such Profits.</i></p> <p>43. <i>Executory Interests are devisable.</i></p> <p>47. <i>And assignable.</i></p> <p>50. <i>May be passed by Fine.</i></p> <p>51. <i>Descendible and transmissible to Heirs and Executors.</i></p> <p>54. <i>The Court of Chancery will prevent Waste.</i></p> <p>55. <i>Of Trusts of Accumulation.</i></p> |
|---|--|

Section 1.

MR. FEARNE lays it down, that where one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken. Thus Serjeant Pemberton says, the several limitations of a devise of one and the same thing shall never be made to operate several ways, viz. some by way of executory devise, and others by way of remainder. The

Where one Limitation is Executory all the subsequent ones are so likewise.
Ex Dev. 334.
Carth. 310.

court seemed to admit the distinction; but it may be proper to consider upon what reasons it is grounded.

§ 2. With respect to the devise of a term it is clear, that if there be twenty limitations of it after a devise to one for life, &c., every one of the twenty will be equally executory as the first of them; because all are equally limitations of a term, after a disposition thereof for life, which cannot hold otherwise than by way of executory devise. Therefore the question can only arise in regard to the devise of a freehold: and then we are to consider, that every executory devise is either the limitation of an estate, after the fee has been already disposed of, or else is a freehold to commence *in futuro*, without any preceding freehold to support it. In the first case it is evident that every limitation, subsequent to the first executory devise, must also be executory; because it is also a limitation of an estate after the fee has been already disposed of. In the latter case, the first executory limitation, being the first freehold limited by the will, no freehold can vest in possession under that will, before the time appointed for such limitation to take effect; if it could, then would that supposed limitation be really not executory; because it would in that case be supported by a preceding freehold.

Tit. 16. c. 1.
l. 39.

§ 3. It is true that, in relation to contingent remainders, a subsequent remainder may vest in interest before a preceding contingent remainder, but that is only where some preceding freehold vests in possession in the mean time; but no subsequent remainder can
first

first vest in possession, and afterwards a preceding estate take place: for, wherever a subsequent limitation vests in possession, before a preceding contingent one can arise and vest, such preceding one is utterly precluded and destroyed. But, in the case now under consideration, there is no freehold limited to vest immediately in possession; we cannot make the preceding estate and the remainder change places, and the latter come into possession before the former; this would be absurd, and directly contrary to the order of limitations. If this cannot be done, then no one of the subsequent limitations can take place before the time limited for the first; they are all, therefore, equally freeholds to commence *in futuro*, without any present limitation, or estate of freehold to support them; and consequently they are all equally executory, till the time comes for the first estate to vest or fail; then all the limitations to persons *in esse* and ascertained may vest, and no longer continue executory.

§ 4. Thus, in the case of *Gore v. Gore* it was held, Ante ch 18. that, till the event of *Thomas Gore's* having a son should be decided one way or the other, by the birth of such son, or by *Thomas Gore's* death without one, the devise to his son was executory; being a freehold limited to commence *in futuro*.

§ 5. A preceding executory limitation may, however, be uncertain and contingent; when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional (otherwise than in respect of the possibility of its expiration before the former vests

A preceding Executory Limitation may be uncertain, when a subsequent one may be certain,

or fails); but may be so limited as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases, it must vest at the time appointed for the preceding limitation to vest: for, should the preceding limitation fail of taking effect, the subsequent one will then vest in possession: should the preceding take effect, the subsequent one will at the same time vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, to which other remainders of the same kind are subject.

Brownsword
v. Edwards,
2 Ves. 243.

§ 6. A person devised to trustees and their heirs, to receive the rents and profits, till *J. B.* should attain twenty-one; and if he should live to attain the said age of twenty-one or have issue, then to the said *J. B.* and the heirs of his body. But if the said *J. B.* should happen to die before the age of twenty-one, and without issue, then over. Lord *Hardwicke*, considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place either in default of *J. B.*'s attaining twenty one, or on his dying without issue.

Southby v.
Stonehouse,
2 Ves. 610.

§ 7. A married woman devised (in pursuance of a power) the profits of her estate to her husband for his natural life; and, after the death of her husband she bequeathed the said estate to her dear children, if she should leave any to survive her; but, in case she
should

should leave no such child or children, nor the issue of such child or children, and after the decease of her dear husband, then she gave and bequeathed the said estates to her friend *J. H.* making him thereby her sole heir of her last will and testament, in default of issue left by her, and after the death of her husband. At the time of making this will, the testatrix was with child, and soon after had a daughter, and died.

Lord *Hardwicke* held, that the child took an estate tail, and not a fee; and that the devise over to *J. H.* was a vested remainder, and not a limitation to take effect only on the event of the testatrix's dying without *leaving* any child, or the issue of any living at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate tail, *viz.* there being no issue at all, or such issue dying without issue.

§ 8. A distinction must, however, be made between cases of this nature, and the case where a testator devised to *B.* his son and heir; and, if he died before twenty-one and without issue of his body then living, the remainder over, &c. *B.* survived the twenty-one years and then sold the lands and died; and it was held that he had a fee-simple immediately: for the estate tail was limited to arise upon a contingency subsequent.

Collinson v. Wright,
1 Sid. 148.

§ 9. And also, where a person devised lands to his wife till his son came of age; and then that his son

K k 4

should

1 Ab. Eq.
188. pl. 8.

should have the land to him and his heirs; and, if he died without issue before his said age, then to his daughter and her heirs. This was held to be a good executory devise to the daughter, if the contingency happened; and if he lived to twenty-one, though he after died without issue, or left issue though he died before twenty-one, yet the daughter was to have the land, because he was to die without issue *and* before twenty-one, or else the daughter could not take.

Ante f. 6.

§ 10. It is observable that, in the two last cases, the devise to the son was in fee, so as not to admit a regular remainder after it. Whereas, in that of *Brownsword v. Edwards*, the first devise was in tail, upon which Lord *Hardwicke* laid so much stress as to say, that had the devise been to *B.* and his heirs, the construction he gave could not, he believed, be made; for, where there was such a contingent limitation, he did not know that the court had changed the word heirs into heirs of the body to make it so throughout.

A preceding
Executory
Limitation is
not a Condi-
tion prece-
dent.

Tit. 16. c. 1.
f. 65.

Scatterwood
v. Edge.

§ 11. It has been observed in a former title, that, where a devise is made upon a condition annexed to a preceding estate, that is, where it is made after a preceding executory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate; if that preceding limitation or contingent estate never should arise or take effect, the remainder over will nevertheless take place; the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to the subsequent limitation.

§ 12. A person

§ 12. A person devised a term for years to his wife for life, and after her death to the child she was then enſient with; and if ſuch child died before it came to twenty-one, then he deviſed one-third part of the ſame term to his wife, her executors, adminiſtrators and aſſigns, and the other two-thirds to other perſons. One of the queſtions was, whether the deviſe to the wife of one-third part of the term was good, becauſe it happened ſhe was not *enſient* at all, and ſo the contingency upon which the deviſe to her was to take place never happened; and Lord *Harcourt* held it was good.

Jones v.
Westcombe,
1 Ab. Eq.
245.

§ 13. A caſe aroſe in the King's Bench upon the ſame will; and Lord Chief Juſtice *Lee* delivered the opinion of the court, “ That the limitation over was
“ good; that the deviſe to the infant being ineffectual
“ was out of the caſe, and the law the ſame whether
“ the deviſe immediately preceding the limitation over,
“ was originally void, or became ſo by non-exiſtence
“ or non-entity of the perſon: for that ſince the law
“ allows ſuch limitation over, it allows the waiting
“ for it; that it was one of thoſe executory limita-
“ tions, which depend on ſome contingency, on the
“ failure of a preceding limitation, none of which
“ take in all the ways of failing, but ſtill it was the
“ ſame thing.”

Andrews v.
Fulham, cited
1 Vef. 421.

§ 14. This reſolution was upon the leaſehold part of the eſtates, which paſſed by the will; but afterwards the ſame point, in regard to the freehold lands, came before the C. B.; which court was of opinion,
that

Roe v.
Welkett, cited
1 Vef 421.
1 Wilf. 107.
3 Burr. 1624.

that the event of no child's being born was a *casus omiffus*, concerning which no direction was given by the will; that the rule was, that an heir at law is not to be disinherited but by express words or necessary implication; so that upon that ground the devise over could not take effect: that *Andrews v. Fulham*, being a determination on the leasehold, was distinguishable; that the plaintiff there had assented to the devise over, and so was concluded; and that there was a difference of construction between the leasehold and freehold, because of the favour shewn to the heir at law.

Gulliver v.
Wickett,
1 Will. 105.

§ 15. Upon this another ejectment was brought in B. R., when *Lee* Ch. J. delivered the opinion of the court, that the devise over was to be considered as a limitation subsequent; the first as a preceding limitation (not a condition) which, whatever way it was laid out of the case, the other took effect. That the true construction of the will was, that there was a good devise to the wife for life, with a contingent remainder to the child in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife; and the number of contingencies was not material, if they were all to happen within a life in being, or a reasonable time afterwards.

Aselyn v.
Ward,
1 Vef. 420.

§ 16. Serjeant *Urling* devised his real estate to his brother *Goddard Urling* and his heirs, on this express condition, that within three months after his decease
he

he should execute, and deliver to his trustee, a general release of all demands, which he might claim on his estate for what cause soever. But if his brother should neglect to give such release, the said devise to him should be null and void to all intents; and in such case he devised it to *Richard Ward* his heirs and assigns for ever. *Goddard Urling* died in the lifetime of the testator.

It was decreed that the devise over should take place; and though a distinction was contended for between the case of a remainder over, after an executory particular estate only, and those cases wherein an executory devise was introduced after a disposition of the whole fee, yet Lord *Hardwicke* exploded that distinction, as he did not find (he said) any authority to warrant it.

§ 17. It seems now to be settled, that whatever number of limitations there may be, after the first executory devise of the whole interest; any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life in being, may be good in event; if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested.

Limitations over, after an Executory Devise of the whole Interest, sometimes good.

Maffenburgh
v. Ash,
1 Vern. 234.
304.

§ 18. A term for years was assigned to trustees, in trust for husband and wife, during their lives and the life of the longer liver of them; and if there should happen to be issue male of their bodies, living at the time of the decease of the survivor of them, then in trust that the eldest son of that marriage should be maintained out of the rents and profits until he attained his age of 21 years, and then the whole term to be assigned to him; and in case he should die before the age of 21 years, then in like manner to the second, third, and every other son of that marriage. But, in case there should be no such issue living at the time of the decease of the survivor of the husband and wife, or in case there should be such issue, and they should all die before any of them attained the age of 21 years, then the term was limited to Sir *William Maffenburgh*.

The husband and wife died, leaving a son, who died while an infant.

Lord Keeper *North* said that, as the rules of Chancery, respecting the limitations of trusts of terms for years, were the same with those by which executory devises of terms for years were governed at law, he would have the opinion of the judges on this point.

The Judges of the Court of Common Pleas having unanimously given their opinion, that the contingent limitation over to Sir *William Maffenburgh* was good, because it must happen within the space of 21 years after a life in being: the Lord Keeper decreed accordingly.

§ 19. *Alice Higgins* demised the premises, being a term for 999 years to trustees, in trust for herself for life; remainder to *H. Higgins* her son, and *Mary* his intended wife; and after their several deceases, in trust for the eldest son of the said *H. Higgins* by the said *Mary Dowler*, in tail; and, for default of issue of such first begotten son, for all and every the other son and sons of the said *Henry Higgins* by the said *Mary Dowler*; and, for default of such issue male of the said *Henry Higgins* by the said *Mary Dowler*, then in trust for all and every the daughters. There never was a son of the said marriage, but there was a daughter; and, the husband and wife being both dead, it was objected, that the limitation of the trust to the daughter was void, it being after a limitation in tail to the sons, which, in case of a term, was not to be allowed.

Higgins v. Dowler,
1 P. Wms. 98.
Vide Salk.
156.

Lord Chancellor *Cowper* said, there was a diversity where the limitation in tail had vested: for there, it must be admitted, the remainder over would be void. But, as in this case there never was a son, the remainder to the daughter was good: and it was no more than the limitation of the trust of a term two ways, *viz.* if there be a son by the marriage, then the limitation is to that son. But, if there be no son of the marriage, but a daughter, then to that daughter; and this was not too remote a contingency, because confined to a life in being.

§ 20. *Dorothy Lennard*, being possessed of lands in the county of *Surry* for the residue of a term of 500 years, devised them to a trustee, in trust to permit her

Stanley v. Leigh,
2 P. Wms.
686.

nephew *Francis Leigh*, and his assigns, to receive all the rents and profits of the premises for so long as he should live, and, after his decease, to the use of his first son and the heirs male of his body, and in default thereof, to the use of his second and other sons in the same manner; and, in default of such issue, to the use of the daughter and daughters of *Francis Leigh*; or, in case of their death before the age of 21, or marriage, then to the use of *Edward Stanley* for the then residue of the term.

Francis Leigh died without issue; and the question was, Whether the limitation of the term to *Edward Stanley* was good?

Sir *Joseph Jekyll* M. R. said, he did not think this limitation tended to a perpetuity. Such a limitation of an estate in fee-simple would have been good; and yet that would have gone farther towards a perpetuity: for the sons, though not *in esse*, must all have taken one after another; and none of them could have barred the remainder but by a recovery, which requires time: Whereas, in this case, the first son would, upon his birth, have had the whole residue of the term, subject to the precedent interest, vested in him; and it could never have gone over to any remainder, if he had died under age; but his executors or administrators would have had it, who could have aliened or assigned it immediately.

Tit. 8. c. 2.
f. 18.

It was decreed that the limitation over was good.

§ 21. In the case of *Stephens v. Stephens*, the cer- Ante.
 tificate of the Judges, after stating that the devise of
 the first son of *Mary Stephens*, who should attain the
 age of 21 years, was good, goes on in these words :
 “ The consequence whereof is, that all the subsequent
 “ limitations will be good. The estate will vest in
 “ *Thomas*, the son now living, when he shall attain
 “ the age of 21 years, in tail male, according to the
 “ clause directing the order of succession between the
 “ sons to be born. If *Thomas*, the son now living,
 “ should happen to die before his age of 21 years, and
 “ the testator’s daughter Dame *Mary Stephens* should
 “ have any other son by Sir *Thomas Stephens*, then the
 “ estate will go over to him, when he shall attain his
 “ age of 21 years, in like manner as it would have
 “ vested in *Thomas*. If *Thomas* the son should die
 “ before the age of 21 years, and Dame *Mary* should
 “ have no other son by Sir *Thomas Stephens*, who
 “ should attain his age of 21 years, then his estate
 “ will go over to *Sarah* the daughter, and all the
 “ other daughters of the said Dame *Mary* by Sir *Tho-*
 “ *mas*, as tenants in common in tail, with remainder
 “ over to *Richard Stephens* the testator’s brother in
 “ fee. But, in case *Thomas* the son should die before
 “ the age of 21, and *Sarah* the daughter should then
 “ be dead without issue, and there should be no other
 “ son of Dame *Mary*, who should attain the age of
 “ 21 years, or any other daughter hereafter, born of
 “ their bodies, then the estate will go to the said Sir
 “ *Richard Stephens*, by virtue of the last remainder
 “ to him in fee.”

Distinction
between the
Cases, where
a subsequent
Limitation
may become
good, and
where not.
Ferne Ex
Dev. 491.

§ 22. In the foregoing cases it is observable, that wherever a preceding executory limitation carried the whole interest, a subsequent limitation was not considered as a limitation *upon* the preceding, and to take effect after it, but as an alternative substituted in its room, and to take effect only in case the preceding one should fail, and never take effect at all: and, where a preceding executory limitation did not carry the whole interest, a subsequent one was considered either as becoming vested in interest as a remainder expectant on the preceding estate, as soon as that took effect, or else as taking effect in possession at the time limited for the preceding estate to vest, in case that preceding one failed of taking effect: so that, in either case it follows, that, if the preceding limitation was not too remote in its creation, the subsequent one could not be so, being to take effect at the time limited for the first, or else not at all. It was therefore necessary to distinguish between instances of this kind, and those cases wherein, either the preceding limitation is not executory but vested, or there is no preceding limitation at all: for, in either of such cases, the future limitation cannot be merely an alternative, but is absolutely limited to take effect either after the expiration of the preceding limitation; or else, if there be no preceding limitation, upon the happening of some future event. And, therefore, if the expiration of that preceding limitation be of too remote a nature, the future limitation is void in its creation, and no subsequent accident can make it good; because it is not, as in the former cases, limited to take effect, or to fail upon the event of a contingency, which must be determined

mined one way or other within the period allowed by law for the vesting of an executory devise, but is limited absolutely to take effect on an event which may not happen within such a period.

§ 23. Thus, although in the case of a devise of lands in fee to the first son of *A.*, who shall attain the age of 21, and in default of such issue remainder to *B* in fee, such a limitation would fail or take effect, according as the first limitation should vest or not. Yet, if a devise be to the heirs male of the body of *C.*, and in default of such issue, remainder to *D.* in tail, here, if we suppose the first limitation void, the subsequent one is an absolute future limitation, to take effect after a dying without issue; and, therefore, though no heirs male of the body of *C.* should ever exist, such event will not make good the limitation to *D.*, which was too remote in its creation, and could not be considered, as in the former case, merely as an alternative to a preceding limitation, and which must vest at the time limited for that preceding one to vest, or else not at all.

Sabbarton v. Sabbarton, Forreſt 245.

2 Bur. 878.

§ 24. It has been stated that, whenever a contingent limitation is preceded by a freehold capable of supporting it, it is construed a contingent remainder, and not an executory devise. But it is possible, that the freehold so limited may, by a subsequent accident, become incapable of ever taking effect at all; as, by the death of the first devisee in the testator's lifetime, in which case, the subsequent limitation, if the contingency has not then happened, will be in the same condition at

A Limitation, which was originally a contingent Remainder, may take effect as an executory Devise. Fearn Ex. Dev. 492.

the testator's death, that is, at the time when the will is to take effect, as if it had been limited without any preceding freehold. Now, in this case it has been held, that, where such subsequent limitation could not vest at the testator's death, it should enure as an executory devise, rather than fail for want of that preceding freehold, which had never taken effect.

Hopkins v.
Hopkins,
Forrest 44.

§ 25. Mr. *Hopkins* devised his real estate to trustees and their heirs, to the use of them and their heirs, in trust for *Samuel Hopkins* for life; and, from and after his decease, in trust for the first and every other son of the said *Samuel*, and the heirs male of the body of every such son; and for want of such issue, in case *John Hopkins* (the father of *Samuel Hopkins*) should have any other son or sons of his body, then in trust for all and every such son and sons respectively and successively, for their respective lives, with the like remainders to their several sons, with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said *Samuel Hopkins*; and for want of such issue, in trust for the first and every other son of the body of *Sarah*, (the said *John Hopkins's* eldest daughter) lawfully to be begotten, with like remainders to the sons of *John Hopkins's* other daughters; and for want of such issue, then in trust for the first and every other son of his cousin *Ann Dare*, lawfully to be begotten, with like remainders to the heirs male of the body of every such son of the said *Ann Dare*; and for default of such issue, then in trust for his own right heirs for ever.

Samuel

Samuel Hopkins died in the testator's lifetime, without issue; and, some time after, the testator died. Nor had *John Hopkins* any other son, nor were any of the other remainder-men *in esse* at the testator's death, except a son of *Anr Dare's*.

Lord *Talbot*.—"Two questions have been made upon this will. The first is, whether this limitation to the first and every other son of *John Hopkins* can now take effect as an executory devise? Or, whether it shall be taken as a contingent remainder, and, consequently, void for want of a particular estate to support it by reason of *Samuel's* death in the testator's lifetime; and that *John Hopkins* had no son *in esse* at the testator's death, when the remainder might vest? As to the first, I think it impossible to cite any authorities in point: none have been cited. It seems to be allowed, that if things had stood as they did at the time of making the will, the limitation in question would have been a remainder, by reason of *Samuel's* estate, which would have supported it. So is the case of *Purefoy v. Rogers*: and limitations of this kind are never construed to be executory devises, but where they cannot take effect as remainders. So, on the other hand, it is likewise clear, that, had there been no such limitations to *Samuel* and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and, consequently, not able to enure as a remainder: so that it must be the intervening accident of *Samuel's* death in the testator's lifetime, upon which this

Ante ch. 18.
f. 7.

“ point must depend. And, as to that, I am of opi-
 “ nion, that the time of making the will is principally
 “ to be regarded, in respect to the testator’s intent.
 “ And if, in this case, we consider it as an executory
 “ devise, the intent will be served in case *John Hop-*
 “ *kins* has a second son : but, if it is taken as a re-
 “ mainder, the intent plainly appearing that a second
 “ son of *John Hopkins* should take, is quite destroyed,
 “ there being no precedent estate to support it as a re-
 “ mainder. The very being of executory devises
 “ shews a strong inclination, both in courts of law
 “ and of equity, to support the testator’s intent as far
 “ as possible : and, though they be not of antient
 “ date, yet they are of the same nature with spring-
 “ ing uses, which are as old as uses themselves. I can
 “ see no difference between this case and the others of
 “ a like nature, that have been adjudged : and if such
 “ a construction may be made consistently with the
 “ rules of law, and agreeable to the testator’s intent,
 “ it would be very hard not to suffer it to prevail. In
 “ *Pay’s* case, had the testator lived to *Michaelmas*,
 “ the limitation had been a remainder. And if a re-
 “ mainder in its first creation does, by any subsequent
 “ accident, become an executory devise, why should
 “ it not be good here ; upon the authority of that
 “ case, where, by the testator’s death before *Michael-*
 “ *mas*, what would otherwise have been a remainder,
 “ was held to be good by way of executory devise.
 “ I think that, in this case, the limitation would ope-
 “ rate as an executory devise, if it was of a legal
 “ estate ; and, therefore, shall do so as a trust, the
 “ rules being the same.”

Ante ch. 13.
 f. 2.

§ 26. Soon after the above decree was made, *John Hopkins* had issue *William Hopkins* a second son, upon which it was held, that the executory devise having thereby once vested, the subsequent limitations thereupon became contingent remainders. And though such son afterwards died before the subsequent limitations vested, yet were they not destroyed; because it was held that the inheritance vested in the trustees was as sufficient to support them, as if there had been estates limited for that particular purpose.

1 Vef. 269.
1 Atk. 581.

§ 27. In the case of *Stephens v. Stephens*, it was held, that till the estate became vested in some one of his grandsons, who attained 21, the limitations over to the daughters of his daughters must have been executory devises. But, as soon as ever the estate should become vested in a son, then those subsequent limitations must of course take effect, as vested remainders upon the preceding estate tail in such son.

Ante ch. 17.
f. 19.

Brownfword v. Edwards.
Ante.

§ 28. But when a preceding freehold has once vested, Mr. *Fearne* says, no subsequent accident will make a contingent remainder enure as an executory devise: this being a direct consequence of the rule above stated, that, wherever a devise may be construed a contingent remainder, it shall never be considered as an executory devise.

Ex. Dev.
498.

§ 29. It has been held that, where an executory devise is limited *per verba de presenti*, that is, where the devisee is mentioned as a person in present existence, and the commencement of the estate devised is not expressly deferred to a future period, there the devisee must

Distinction between executory Devises *per verba de presenti*, and *per verba de futuro.*
Fearne Ex. Dev. 503.

must be a person capable at the death of the devisor; otherwise the devise will be void. As, if one devise immediately to the heir of *J. S.*, and *J. S.* is living at the death of the testator, it is said the devise shall not be construed an executory devise, and, therefore, must be void: but that, if it were to the heir of *J. S.* after the death of *J. S.*, that would be clearly good as an executory devise, because a future time is mentioned.

1 Salk. 226.

Id. 229.

T. Raym. 83.

§ 30. So it has been said, that a devise to the first son of *A.*, having none at the time, is void: but, if it were to the first son of *A.*, when he shall have one, it will be good. Though Lord Chief Justice *Bridgman* said, that a devise to *J. S.* for 15 years, remainder to the right heirs of *J. D.*, is not good: but that a devise to one for 15 years, remainder to the first son of *J. D.*, is good; because the devisor takes notice that *A.* has no son, and intends a future act.

Ante ch. 18.
f. 4.
Fearne Ex.
Dev. 504.
Ante.

§ 31. It has been already stated, that a devise to an infant *in ventre matris*, is good: and in the case of *Guliver v. Wickett*, the Court held, that the limitation to the child, of which the wife was supposed to be *ensent*, if there had been no devise to the wife for life, being *in futuro*, would have been a good executory devise.

Tit. 12. c. 1.
f. 16.
Doe v. Carleton, 1 Will.
225. Harris
v. Barnes;
4 Bar. 2157.

§ 32. In the case of *Chapman v. Blisset*, Lord Talbot held, that the devise to the unborn children of the testator's grandson, (though made *per verba de presenti*), should take effect as an executory devise; the intention being clearly future.

§ 33. Mr.

§ 33. Mr. *Fearne* concludes his observations on this subject by saying, that, whatever force is to be allowed to the distinction between executory limitations *per verba de præfenti*, and *per verba de futuro*, it can only affect those cases where there is not the least circumstance, from which to collect the testator's contemplation or intention of any thing else, than an immediate devise to take effect *in præfenti*. Ex.Dev. 510.

§ 34. Where there is an executory devise of a real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descend to the testator's heir at law. The Freehold descends, in the mean-time, to the Heir.

§ 35. Thus, in *Pay's* case, which has been already stated, it was held that the freehold and fee-simple descended to the heir at law. So, in *Clarke v. Smith*, the estate was held to have descended to the heir at law, and continued in him for six months, Ante ch. 18. f. 2. Id. f. 3.

§ 36. In the case of *Gore and Gore* it was held, that the freehold descended to the heir at law, till *Thomas Gore* had a son. Ante ch. 18. f. 14. 2 P.Wms. 65. Hayward v. Stillingfleet, 1 Atk. 422.

§ 37. Where there is a preceding estate limited, with an executory devise over of the real estate, the intermediate profits, between the determination of the first estate and the vesting of the limitation over, will go to the heir at law, if not otherwise disposed of. And also the intermediate Profits.

§ 38. Thus, in the case of *Hopkins v. Hopkins*, it was decreed that, till *John Hopkins* had a son, the rents Ante f. 25.

and profits should go to the heir at law of the testator : and afterwards a son being born to *John Hopkins*, upon the death of that son, it was decreed, that the rents and profits should belong to the heir, till some other person should become entitled, under the limitations in the will.

Bullock v.
Stones,
3 Ves. 521.

§ 39. A testator devised his real estate to trustees, and willed that the first son of *John Stones*, when he came to 21, should have it, and his heirs for ever ; and that he should be well educated, *John Stones* had no son when the testator died.

Lord *Hardwicke* said, this was a good executory devise to the first son of *John Stones*, when he attained 21. And, as to the rents and profits in the mean time, where there is an executory devise, whether of a legal or a trust estate, the rents and profits go to the heir at law ; because the legal estate in the one case, or the trust in the other, descends in the mean time to the heir at law. But this intermediate interest, or benefit arising to the heir at law, would determine when *John Stones* had a son ; for that son's education must come out of the rents and profits,

A Devise of
the Residue
will pass such
Profits.

§ 40. But a devise of all the rest and residue of the real estate will pass, as well the profits from the testator's death to the time of the estate's vesting, as those from the determination of the first estate, to the vesting of a subsequent one.

§ 41. In the case of *Stephens v. Stephens*, it was decreed by the advice of the Judges, that the intermediate profits passed to Sir *Richard Stephens* by force of the residuary devise, as an interest in the real estate, not otherwise disposed of.

Ante ch. 17.
f. 19.]

§ 42. A testator devised all the rest and residue of his real and personal estate, of what nature or kind soever, to such child or children as his daughter should have. It was held that the profits, from the testator's death to the birth of a child of his daughter, should pass under this devise.

Rogers v. Gibson,
1 Ves. 485.

§ 43. It was formerly held, that contingent estates, in lands of freehold, were not devisable; but it has been already stated, that the law is now altered in this respect; and, therefore, executory estates, and possibilities accompanied with an interest, which would be descendible to the heir of the object of them, dying before the contingent event, on which the vesting of the estate depended, are devisable.

Executory
Interests are
devisable.
Ante c. 3.
f. 17.

§ 44. Executory interests in terms for years, were always held to be devisable.

§ 45. A person, possessed of a term in lands, devised the same after his wife's death to his son. The son made his will, and thereby gave the lands, devised to him by his father's will, to the plaintiffs; and died in his mother's lifetime. The Lord Keeper decreed the lands to be enjoyed by the plaintiffs, according to the will of the son.

Veizy v. Pinwell,
Pollexf. 44.

Wind v.
Jekyll,

1 P.Wm 572.

§ 46. *A.* devised a term for years to *B.* for life, remainder to *C.* *C.* in the lifetime of *B.* devised this remainder. Decreed that the devise was good, and amounted to *C.*'s. declaring by his will, that his executor should stand possessed of the term in trust for the devisee.

And assignable.

§ 47. At common law, a possibility was held not to be assignable, although in certain cases it might be released: but the Court of Chancery has, in many instances, determined, that a possibility of a term for years is assignable.

Thimpland v.
Courtney.
2 Freem. 250.

§ 48. A testator, possessed of a term for 1000 years, devised it to *B.* for 50 years, if he should so long live, and, after her decease, to *C.*, and died. *C.* assigned it to *D.* during the life of *B.*: and this assignment was held good.

Theobalds v.
Duffey,
2 P. Wms
608.

§ 49. A testator devised his term to his wife for life, remainder to his son and daughter. The daughter and her husband, in the lifetime of the wife, assigned over their moiety; and, after the death of their brother, they assigned over the other moiety, the mother being still alive. This assignment was established in Chancery, and also by the House of Lords,

Vide Wright
v. Wright,
1 Vef. 409.

May be passed
by Fine.

Tit. 35. c. 12.
f. 8.

§ 50. Executory interests, or possibilities in lands of inheritance, may be passed at law by fine, by way of estoppel; of which, an account has been already given.

§ 51. An executory interest, whether in estates of inheritance, or terms for years, is descendible and transmissible to the heirs or executors of the devisee, where such devisee dies before the contingency happens: and, if not disposed of before, will vest in such heirs or executors when the contingency happens.

Descendible
and trans-
missible to Heirs
and Execu-
tors.

§ 52. A testator devised to *A.* and his heirs; and, if he died before 21, then to *B.* and his heirs. *A.* died before 21; but *B.* died before him. The question was, whether *B.*'s heirs should take? And the Court held clearly that, though *B.* died in the life of *A.*, yet his heirs might well take under the executory devise: for that such a devise was not to be considered as a mere possibility, but as an interest, of the same nature as a contingent remainder, and, consequently, transmissible.

Gurnell v.
Wood,
8 Vin. Ab.
112. Willes
R. 211.

§ 53. *George Paynter* devised freehold and copyhold messuages to his son *George Paynter*, his heirs and assigns for ever: but if he should happen to die before he attained his age of 21 years, leaving no issue living at the time of his death, then he devised the said premises to his mother *Catherine Paynter*, her heirs and assigns for ever. After the decease of the testator, his mother *Catherine Paynter* died in the lifetime of *George Paynter* the son, who afterwards died under age, and without issue.

Goodright
v. Searle,
2 Will. Rep.
29.

The question was, whether this executory devise descended to the heir of *Catherine Paynter*? And it was determined, that the lands vested in the heir at law of
Catherine

Catherine Paynter, upon the happening of the contingency, viz., upon the decease of *George Painter* under age, and without issue.

The Court of
Chancery
will prevent
Waste.
Garth v.
Cotton,
Tit. 16. c. 7.
f. 24.

§ 54. In cases of contingent or executory interests, the Court of Chancery will interfere in behalf of the persons entitled to such interests, to prevent unreasonable waste being committed by the tenants in possession.

Of Trusts of
Accumula-
tion.

§ 55. It has been determined in a late case, that a testator may direct the rents and profits of an estate, whereof an executory devise is made, to accumulate till the time when such estate becomes vested. And that the doctrine of executory devises, as to the time when they must vest, was applicable to a trust of accumulation.

Thellusson v.
Woodford,
4 Ves. Jun.
227.

§ 56. *Peter Thellusson* being seised of very considerable real estates, and of a very large personal estate, and having three sons, *Peter Isaac Thellusson*, *George Woodford Thellusson*, and *Charles Thellusson*, devised all his manors, messuages, lands, tenements, and hereditaments, to trustees, their heirs and assigns for ever, upon the trusts therein-after mentioned; and, as to the residue of his personal estate, he gave and bequeathed the same to the same trustees, their executors, administrators, and assigns, upon trust that they should, as soon as conveniently might be after his decease, invest the same in the purchase of freehold estates of inheritance, upon the trusts therein-after mentioned. And he directed that his trustees, their heirs and assigns, should stand seised of the real estate devised

vised to them, and of the estates directed to be purchased, upon trust to receive the rents and profits of them during the natural lives of his sons, *Peter Isaac Thelluffon*, *George Woodford Thelluffon*, and *Charles Thelluffon*, and his grandson *John Thelluffon*, son of his said son *Peter Isaac Thelluffon*, and of such other sons as his said son *Peter Isaac Thelluffon* then had or might have, and of such issue as his said grandson *John Thelluffon* might have, and of such issue as any other son of his said son *Peter Isaac Thelluffon* might have, and of such sons as his said sons *George Woodford Thelluffon* and *Charles Thelluffon* might have, and of such issue as such sons might have, as should be living at the time of his decease, or born within due time afterwards, and during the natural lives and life of the survivors and survivor of the several persons aforesaid. The testator then directed, that his trustees should from time to time invest the money, to arise from such rents and profits, in such purchases as he had therein-before directed to be made with his personal estate. And that they should from time to time collect, receive, lay out, and invest the rents and profits of those estates in the same manner. And he directed his trustees from time to time to cut such timber on the estate devised and to be purchased, as should be fit to be cut, and to sell the same; and to invest the money arising by such sales in such purchases, as were therein-before directed to be made: and he empowered the trustees to make leases and generally to act in the management of the trust estates, as if they were their own. He then directed, that after the decease of the several persons, during whose lives the rents and profits of the estates

estates devised and to be purchased were directed to accumulate, an equal partition should be made by the trustees, of the estates; and that the whole thereof should be divided into three lots of equal value: and he then directed the manner in which those lots should be limited; which, as to the first of the lots, is expressed in the following words: “ I do hereby direct
 “ that the premises contained in one of such allot-
 “ ments, shall be conveyed to the use of the eldest
 “ male lineal descendant then living, (and who shall
 “ be entitled to the first choice of such allotments),
 “ of my said son *Peter Isaac Thelluffon* in tail male, with
 “ remainder to the second, third, fourth, and all and
 “ every other male lineal descendant or descendants then
 “ living, who shall be incapable of taking as heir in tail
 “ male of any of the persons to whom a prior estate is
 “ hereby directed to be limited, of my said son *Peter*
 “ *Isaac Thelluffon*, successively in tail male; with remain-
 “ ders, in equal moieties, to the eldest and every other
 “ male lineal descendant or descendants then living
 “ of my said sons *George Woodford Thelluffon* and
 “ *Charles Thelluffon*, as tenants in common in tail
 “ male, in the same manner as herein-before directed,
 “ with respect to the eldest and every other male lineal
 “ descendant or descendants of my said son *Peter Isaac*
 “ *Thelluffon*, with cross-remainders, between or among
 “ such male lineal descendants as aforesaid of my said
 “ sons *George Woodford Thelluffon* and *Charles Thel-*
 “ *luffon*, in tail male: or, in case there shall be but
 “ one such male lineal descendant, then to such one
 “ in tail male; with remainder to the use of them the
 “ said *Matthew Woodford*, *James Stanley*, and *Em-*
 “ *perar*

“ peror *John Alexander Woodford*, their heirs and
 “ assigns for ever, upon the trusts, and to and for the
 “ intents and purposes, hereinafter mentioned, ex-
 “ pressed, and declared of and concerning the same.”

He then directed the estates, included in one other of such allotments, to be conveyed to the use of the eldest male lineal descendant then living, (and who was to have the second choice of such allotments), of his son *George Woodford Thelluffon* in tail male, with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants of the said *George Woodford Thelluffon* successively in tail male; and with similar remainders, in equal moieties, to the eldest and every other male lineal descendant or descendants then living of the said *Peter Isaac Thelluffon* and *Charles Thelluffon*, as tenants in common in tail male, with similar cross-remainders; and with the ultimate remainder in the same manner, to the use of the trustees in fee-simple, upon the trusts thereafter mentioned.

He then directed the estates, included in the remaining lot, to be conveyed to the use of the eldest male lineal descendant then living of his said son *Charles Thelluffon* in tail male, with similar remainders to the second, third, fourth, and every other male lineal descendant or descendants then living of his said son *Charles Thelluffon*, successively in tail male; with remainders in equal moieties to the eldest and every other male lineal descendant or descendants then living of the said *Peter Isaac Thelluffon* and *George Woodford Thelluffon*,

Thelluffon, as tenants in common in tail male, with similar cross-remainders; and with the ultimate remainder in the same manner to the use of the trustees in fee-simple, upon the trusts therein-after mentioned.

And he directed that the trustees, their heirs or assigns, should stand and be seised of the estates by him devised and so to be purchased as aforesaid, upon failure of male lineal descendants of his said sons, *Peter Isaac Thelluffon*, *George Woodford Thelluffon*, and *Charles Thelluffon*, as aforesaid, in trust to sell all the said estates, and to pay the money to arise from the said sales unto his Majesty, his heirs and successors, Kings and Queens of *England*, to be applied to the use of the sinking fund, in such manner as should be directed by act of Parliament.

The testator died in 1797, leaving his said three sons; the eldest of whom had then three sons and two daughters, the second two daughters, and the third one son; and the wife of the eldest son was then with child, and was soon after delivered of twin sons.

Some time after the decease of the said *Peter Thelluffon*, two suits were instituted in Chancery, respecting his will; one of them was upon a bill, filed by his widow and children against the acting trustees and executors of his will, and against the two sons of the said *Peter Isaac Thelluffon* born after the testator's decease, and also against his Majesty's Attorney General, praying to have the trusts of the will declared void, and the real estate conveyed to the said *Peter Isaac Thelluffon*,

Thelluffon, as heir at law of the testator, and the personal estate divided among the plaintiffs, according to the statutes of distribution. The other of the suits was instituted upon a bill filed by the acting trustees and executors of the will of the said *Peter Thelluffon*, against all the other persons, who were parties to the first suit, praying to have the trusts of the will established and carried into execution, and the necessary directions to be given for that purpose. Both the original cause, and the cross cause, came on before Lord *Loughborough* in *Lincoln's-Inn-Hall*, in *December 1798*, assisted by the Master of the Rolls (*Sir R. P. Arden*), Mr. Justice *Buller*, and Mr. Justice *Lawrence*, and was argued at great length *. And on the 19th of *February* following, he pronounced his decree in both causes, and thereby dismissed the bill in the original cause, so far as it prayed that the limitations and dispositions, contained in the will of the said *Peter Thelluffon* of and concerning his real estates, and the general residue of the personal estate, and the rents, issues, and profits of such estates, and concerning the estates directed to be purchased, and the rents and profits thereof, and the trusts thereof, might be declared void; and declared in the cross cause, that the will ought to be established, and the trusts of it performed and carried into execution; and declared the devises and limitations of the estates, contained in the will, to be good and valid in the law, and gave directions accordingly.

From this decree the three sons of Mr. *Thelluffon*

* Mr. *Hargrave's* argument has been published by himself, to which, the Reader is therefore referred.

the testator, appealed to the House of Lords: and on their behalf it was contended, that the trust, attempted to be created by Mr. *Thellusson's* will, being of the class of executory trusts created by will, must depend for its validity on its being instituted for those purposes, and limited within those boundaries, which the law prescribes for trusts of that description; but it was neither instituted for those purposes, nor limited within those boundaries.

1st, It was not instituted for the purposes which the law prescribes for those trusts. The nature of it was, to create an equitable estate of inheritance commencing at a future time, without limiting an intermediate equitable estate commensurate with the interval. By the old law, limitations of this kind were illegal. For the purpose of enabling parties to provide for those reasonable occasions of families, which could not be provided for except by allowing future estates of freehold to be limited without a limitation of such a previous intermediate estate, they were first admitted into wills: and afterwards, when uses were introduced, the uses raised by them were admitted among those, which, on account of the fairness and utility of their object, courts of equity thought binding on the consciences of trustees, and the performance of which they would, on that ground, compel by a subpœna. Thus, the circumstance of their being created for the meritorious purpose of providing for the reasonable occasions of families, was the ground on which the uses, raised by these limitations, were admitted among those which courts of equity would execute; and, of course, when they

they were not created for a purpose of that nature, the ground for the interference of courts of equity did not arise. In the present case, there was no such ground. Mr. *Thelluffon's* will was morally vicious, as it was a contrivance of a parent to exclude every one of his children from the enjoyment, even of the produce of his property, during almost a century; and it was politically injurious, as, during the whole of that period, it made an immense property unproductive, both to individuals and the community at large; and, by the time when the accumulation shall end, it will have created a fund, the revenue of which would be greater than the civil list, and would therefore give its possessor the means of disturbing the whole œconomy of the country. The probable amount of the accumulated fund, in the events which had happened, was stated in the appellant's bill, and admitted in the answer, to be 19,000,000; and, in case any of the persons answering the description of heir male, when the period of suspense ended, should be a minor, and his minority should continue 10 years, it would increase the amount of that third to the sum of £ 10,802,373: so that, if the whole property should center in one person, and that person should have a minority of 10 years after the end of the period of suspense, (a circumstance by no means improbable, particularly as Mr. *George Woodford Thelluffon* had been long married and had no son), the whole accumulated fund would amount to £ 32,407,120.

2d, The trust was not confined within that boundary, which the law prescribes for trusts of this de-

scription, even though it should be admitted that all the lives, during which the accumulation was to be carried on, were in existence at the time of Mr. *Thellusson's* decease, as one circumstance, which materially affected the period of suspense, and which entered into every case, in which the suspense of property had been held legal, did not enter into the present case.

In examining the cases decided on limitations of this kind, it would appear, that in every one of them, all the lives during which the suspense was directed to be carried on, were evidently the lives of persons immediately connected with, or immediately leading to, the person with whom under the trust first limited to take effect at the end of the suspense, the property was to vest. Thus, (to instance two cases in which the accumulation was supposed to have been furthest carried on), in that on Lady *Dennison's* will, Miss *Midgley*, during whose life the property might be in suspense, was the mother of the second son to whom the property was devised. And, in *Long v. Blackall*, the testator's posthumous son was immediate ancestor to the heir, in whom the property was directed to vest; but, in the present case, not one of the first lives had an immediate connection with, or immediately led to, the person benefited. In the sense here spoken of, the life of any stranger was equally connected with, and would equally lead to "the respective male descendant of the "testator's son," as the lives assigned by him for the period of suspense. A material difference, therefore, in a point considerably influencing the purpose and

In the Register's Book,
under the
Title of Har-
rison v. Har-
rison,
21st July
1786.
7 Term R.
100.

boundary of the suspense, existed between the present and all the decided cases.

3d, The use made by Mr. *Thelluffon* of the rule, allowing a suspense of property to be carried on for any number of lives in being, was a fraud on the rule. It was a maxim of law, which admitted of no exception, that nothing should be effected by indirect means, which could not be done in a direct manner. Now, a possible suspense of property for 25 years was held to be void, in Sir *John Lade's* case; and, in the late case of *Proctor v. the Bishop of Bath and Wells*, the Court of Common Pleas unanimously decided against the legality of a possible suspense of property for 24 years. Where property was suspended through the medium of lives, if the lives were those of persons connected with the ultimate owner, the persons, whose lives formed the period of suspense, would generally be the parents of the party ultimately benefited, and would not therefore be more than one or two lives at the utmost. Now, the probable duration of one or two such lives falls short of 21 years: but, if an unlimited number of lives were taken, they would reach a century. It was observable, that the probable duration of the lives assumed by Mr. *Thelluffon* reached 70 years. Thus, therefore, if the rule were taken to extend to any number of lives, it would follow, that though, where a number of years directly constituted the term of suspense, property could not be prevented from vesting absolutely during 25 years, according to the determination in Sir *John Lade's* case, or during 24 years, according to the case of *Proctor v. the Bi-*

Lade v. Hol-
ford, Amb.
479. 3 Bur.
1416.
Proctor v.
(Ep.) Bath
and Wells,
2 H. Black.
358.

hop of Bath and Wells; yet, by assigning for the period of suspense a number of lives, whose average duration would be equal to a given number of years, and thus indirectly making years, not lives, to constitute the period of suspense, property might be suspended for a whole century; and the present would be cited, on future occasions, as a case in point for extending the period of suspense to 70 years. Thus, Mr. *Thelluffon's* will was a fraud on the rule. When in the Duke of *Norfolk's* case, Lord *Nottingham* pronounced for the legality of an executory limitation, which kept the absolute ownership of a term for years in suspense for one whole life, and thereby extended the period allowed for the suspense of a term beyond what had been settled for it in the preceding case of *Child v. Bayley*, the possibility of the abuse of that extension of executory limitation was strongly pressed upon him; and he answered it in these remarkable words: "It has been urged at the Bar, where will
 " you stop, if you do not stop at *Child v. Bayley's*
 " case? I answer, I will stop every where, where any
 " inconvenience appears; no where before. It is not
 " yet resolved what are the utmost bounds of limiting
 " a contingent fee upon a fee; and it is not necessary
 " to declare, what are the utmost bounds to a spring-
 " ing trust of a term: whenever the bounds of reason
 " or convenience are exceeded, the law will be quickly
 " known." The use made by Mr. *Thelluffon* of the will is, both in a private and public view, unreasonable and inconvenient; and it is still more objectionable, as, by carrying on indirectly an accumulation for 70 years, which directly could not be carried on
 for

D. of Nor-
 folk's Case,
 3 Cha. Ca. 1.
 2 Cha. Rep.
 229. 2 Free.
 72. 80 Pal.
 223. and Ld.
 Nottingham's MSS.
 Rep. in Mr.
 Haugrave's
 P. session.
 Cro. Jac.
 459 1 Koll.
 Ab. 611.
 Palm. 48.
 333.

for one-third of such a number of years, it was a fraud upon the rule itself. Thus, therefore, the time pointed at by Lord *Nottingham* was come; and it was necessary that it should be known, that the rule was to be understood with this limitation, that whenever, from the number and quality of the lives chosen, it is evident that accumulation, and not a family purpose, was the object of the trust, the bounds of the reason and convenience of the rule were exceeded, and a fraud has been practised on the rule. It was objected to this conclusion, that any inquiry into the reasonableness, convenience, or fairness, of the use made of the rule, must lead to uncertainty, and to an exercise of discretion, which the Bench has always disclaimed: but this did not always follow. As much uncertainty, and as great an exercise of discretion, attends all decisions upon unconscionable contracts, as will attend decisions on the reasonableness, convenience, and fairness, of the use made of the rule in question. A contract might be objectionable for its unreasonableness and unfairness, without being objectionable on the ground of either, to such a degree as will induce a court of equity to rescind it: but still there is a degree, in which equity will interfere. “To set aside a conveyance, there must,” as Lord *Thurlow* said in the case of *Gwynne v. Heaton*, “be an inequality so strong and so complete, that it must be impossible to state it to a man of common sense, without producing an exclamation of the inequality of it.” So, in respect to the rule in question, it may be much abused, without a court’s being justified in taking notice of the abuse: but, when the abuse is so strong, gross, and

1 Bro. Cha.
Rep. 1.,

complete, that every man of common sense, to whom it was stated, must exclaim against it, the case supposed by Lord *Nottingham* was come, and equity would interfere to set it aside. That the rule had been strongly, grossly, and completely abused in the present case, appeared not to be doubted.

4th, The trust was not limited within those boundaries which the law requires for trusts of this description, because the will attempts to protract the accumulation, during the lives of persons unborn at the time of the testator's decease; the testator having selected for that purpose the lives of such persons as might not be born; "till within due time after his decease;" and the persons thus described, could not be considered as persons actually born in his lifetime.

It was true, that, for some purposes, as, at the common law, to take by descent, and by the 10 and 11 *W. 3. c. 16.* to take by way of remainder, a child, who is *in ventre sa mere*, when the estate designed for him would devolve upon him if he were born, becomes entitled to it after he is born, and may then enter upon it, and divest it from the first taker. But his title to enter upon the estate, after his birth, was not a consequence of his supposed existence during the time he was *in ventre sa mere*; but because, in the case of his taking by descent, the law at the instant of his birth invests him, though a posthumous child, with the character of heir, and, consequently, with all the rights of heirship; and because, when he claims by way of remainder, it is expressly provided by the 10 and 11

W. 3.

W. 3. c. 16. that the remainder shall vest in him upon his birth. If the law considered him to exist before his birth, the freehold, during the time of his being *in ventre sa mere*, would be vested in him in the eye of the law, and for the purposes of law; but that clearly was not the case. For, while he was *in ventre sa mere*, the law vested the freehold in the intermediate taker as heir, with every right and burthen of heirship; so that, after the birth of the nearer heir, he even retained the profits of the estates against him. That class, therefore, of lives, which was now the subject of observation, neither had nor could have an existence, either in fact or in law, in the time of Mr. *Thellusson*. It followed that, by the admission of them into the term of suspense, the ground prescribed by law for the suspense of real property had been exceeded. No cases, the subject of which was real property, could be mentioned, in which a child *in ventre sa mere* had been held to be in existence for any purpose, except to limit the estate of the first devisee, or for the child himself, being the substituted devisee. In *Bennett v. Honeywood*, Lord *Bathurst* declared, that the court had never construed a child *in ventre sa mere* to be actually born, at the time of the death of the testator, except in a case of devise to the children. Cases upon trusts of personal estates were not applicable to cases of the present description, arising on devises of real estates. For though rules of law, which require that an estate of freehold should be actually vested in some person, and, therefore, deny a legal existence to a child *in ventre sa mere*, even for his own benefit, were in no-wise applicable to trusts of personal estate. The case

of

Amb. 708.
712.

of *Long v. Blackall*, was the only case where the lawfulness of making a child *in ventre sa mere* a life, for the purpose of suspense, seemed to have been admitted: but that was a case of personal estate; now, as there was no law, which denied a legal existence to a child *in ventre sa mere*, where personal estate was concerned, there seemed, (especially where, as in *Long v. Blackall*, it gave effect to a provision made by a parent for a child), that there was strong ground to contend, that a child *in ventre sa mere* should, in the eye of the law, be supposed to exist for his own benefit, and that there should be a strong disposition in the courts to favour such an argument; but, in the present case, from the mere impossibility of supposing the freehold to be in the child while *in ventre sa mere*, the argument was wholly inadmissible.

Admitting, however, that the lives in question were, for some purposes of law, in existence in the lifetime of *Mr. Thellusson*, they certainly were not in existence for the use he made of them. In the cases, where the nine months have been mentioned, as a period allowed for protracting the suspense of property, it was generally added that the nine months were allowed, for the sake of the child intended to be benefited by the protraction; but a single instance could not be produced, where the nine months have been added for any other purpose; and perhaps an instance could not be brought, where the courts have had occasion to mention the nine months, without adding at the same time, that they were allowed merely for the benefit of the posthumous child. Then, how does the argument stand?

A post-

A posthumous child is, in fact, unborn at the testator's decease ; the law allows that, when after his birth he answers the character of heir taking by descent, and also that in some cases especially provided for by act of Parliament, his being *in ventre sa mere*, shall not deprive him of an estate, to which, if actually born at the time of its devolution, he would have been entitled. To argue from this, that, for all purposes, and particularly for the purposes which, as in the present case, operate to their prejudice, posthumous children should, in the supposition of law, be thought in existence, was unjustifiable.

5th, In other respects, the suspense evidently extended beyond the lives of persons in being at the testator's decease.

The classes of lives are described by the testator in the following words.

(1st,) “ During the natural lives of my sons *Peter Isaac Thelluffon*, *George Woodford Thelluffon*, and *Charles Thelluffon*.”

(2d,) “ And of my grandson *John Thelluffon*, son of my said son *Peter Isaac Thelluffon*.”

(3d,) “ And of such other sons as my said son *Peter Isaac Thelluffon* now has or may have.”

(4th,) “ And of such issue as my grandson *John Thelluffon*, son of my said son *Peter Isaac Thelluffon*.”

(5th,) “ And

(5th,) “ And of such issue, as any other sons of my
“ said son *Peter Isaac Thelluffon* may have.”

(6th,) “ And of such sons as my said sons *George*
“ *Woodford Thelluffon* and *Charles Thelluffon* may
“ have.”

(7th,) “ And of such issue as such sons may have,
“ as shall be living at the time of my decease, or born
“ in due time afterwards.”

The question was, whether all the lives mentioned in this part of the will must necessarily have been in existence in the lifetime of the testator, or whether some of them might come into existence after his decease? On the last supposition, the devise was evidently too remote. Now, unless the words in the third, fourth, fifth, sixth, and seventh members of the sentence, were restrained by the qualifying words, “ as
“ shall be living at the time of my decease, or born
“ within due time afterwards,” which were introduced at the end of the last member of the sentence, they manifestly extended to persons who might be born after Mr. *Thelluffon*’s decease. But the qualifying words could not, upon any principle, either of grammatical or legal construction, apply to them. In common sense, by every rule of grammar, and according to every principle and precedent of legal construction, words of relation are always exclusively referred to the next immediate antecedent; unless such exclusive reference embarrasses the sentence. But, in the present case, the sentence will not only not be embarrassed, by

by confining the reference in the last member of the sentence to the next immediate antecedent in that sentence, but the sentence will be embarrassed in an extreme degree, by extending the reference to any prior member of it. It will not be embarrassed by confining the reference to the last antecedent in the last member of the sentence, for every member of the sentence will then be complete in itself; every member will have its word of relation, and an antecedent word, to which it explicitly refers: but it will be embarrassed in an extreme degree, by extending the reference to the prior members of the sentence. The restrictive words could not be applied to the first or second members of the sentence, without making them absolute nonsense: this alone leads to the conclusion, that they were not to be referred to the other members of the sentence, especially, as without them, and standing by itself, each of those members is perfect. If the restrictive words were referred to the third and fourth members of the sentence, one half of them must be omitted, or the reference would make them perfect nonsense: for the words, “born in due time afterwards,” could never be referred to the words “now has;” as it is impossible that a testator, speaking of sons living when his will is made, can describe them as sons, who may be born in due time after his decease. The fifth member of the sentence was complete without the restrictive words: they did not, however, make nonsense of it; but then they left it altogether open to the force of the objection, as, by every rule of construction, the restrictive words, if they were applied to that member of the sentence, must be referred to the “sons”
mentioned

mentioned in it, and not to “the issue of the sons.” It was impossible to suppose that a testator of the age of 64, at the time he made his will, should have had it in his contemplation to provide for the event of there being in existence, at the time of his decease, a son of an unborn grandson of his body : yet to that supposition the reference of the restrictive words to the word “issue,” in the 5th member of the sentence, necessarily led. Now, if they were referred to the word “sons,” the word “issue” was left unqualified : and then, among the lives, during which the period of suspense was to be carried on, all the issue of the sons must be reckoned, whenever such issue should be born. It was apprehended, that this was the only admissible construction ; and that the legal boundary of suspense was therefore exceeded.

6th, Finally, the testator exceeded the bounds, prescribed by law for the suspense of property, in the clause, by which he directed the property to be vested in the funds, till purchases could be found. The proper and only legal mode of declaring the trusts of these investments, for the purpose probably in the contemplation of the testator, was, directing the dividends, and the annual produce of them, to be applied to the persons, and in the manner in which, if lands were actually purchased and settled, conformably to the trust, the rents of them would be applicable. This the testator did not do ; but, on the contrary, directed the accumulation to be carried on till the purchases were actually made : so that the beneficial ownership of the property would be suspended, not only till all

the lives, during which it was directed to accumulate, should expire, but during such further period as might elapse, between the decease of the last surviving life, and the completion of the last purchase.

On the other side it was contended, on behalf of his Majesty and the public, that the decree should be affirmed, for the following reasons.

1st, That the only question was, whether the testator had transgressed any of those rules of law or equity, which were sanctioned and established by decisions of courts of justice at the time when he made his will? That an executory devise was good which was to take effect in possession, after the determination of any number of lives of persons actually born, and after the death of a child *in ventre sa mere*, (allowing for the period of gestation of such child), was a rule which could not now be shaken, without shaking the foundation of the law. In the present case, on the determination of only nine lives, there would be a vested estate in possession; and the vesting, therefore, of the property in question, was not postponed for a longer period than the law allowed. That there was nothing in this case, which, in technical language, tended to a perpetuity. An estate might be limited to one for life, remainder to another for life, remainder to a third, and so on to 20 persons for life; nay, a settlement had, by the directions of a court of equity, been made, limiting an estate to 50 persons in being, for their successive lives: and no inconvenience had ever been apprehended from such limitations. The rule

Love v.
Wyndham,
Sid. Rep.
450. 3 Cha.
Ca. 29.

Humberston
v. Humber-
ston, 1 P.
Wms. 332.
Scattergood
v. Edge,
Salk. 229.
2 Bro. Cha.
Ca. 30.

rule had been laid down in plain and intelligible terms, with reference to the very circumstance of the number of lives ; that it did not signify how great the number of lives was, for it was but for the life of the survivor, and, therefore, for the life of but one person. A man might appoint 100 or 1000 trustees, and that the survivor should appoint a life estate, that would be within the line of a perpetuity. The judges had never been aware of the difference between one life and 20 lives. Every executory devise was good, that did not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be rendered unalienable beyond the time at which the remainder-man, who was not in existence at the time of the limitation of the estate, would arrive at the age of 21. The court had no criterion to judge of the inconvenience arising from restraining the alienation of property by executory devise, except by analogy to the restraint which the common law allowed to be put on the alienation of real property.

2d, That the notion, that an executory devise was good or bad according to the number of lives after which it was to take effect, never occurred to any judge or lawyer until the present case : nor could such a notion be supported, unless it should be determined that a judge was to decide upon the particular circumstances of each particular case, and that he was not to look for a general rule, but for particular instances in which the general rule had been acted upon. That in the Duke of *Norfolk's* case, Lord *Nottingham*, so far from decid-
ing

ing upon the principle, that executory devises must depend upon the rule of convenience or inconvenience, had positively declared that he intended to confine executory devises and trusts within the limits of estates tail, and without any exception, he gave the same limitation to executory devises, and trusted that the extent of the property, the cruelty or kindness of the disposition could not be permitted to operate upon the decision of a court of justice. The intention of this case was clear and certain: it was consistent with the rules of law, that intention could not be controuled by ideas of its fitness or unfitness, of its policy or impolicy; the intention of the testator was consistent with the settled rules of law at the time when his will was made, and, therefore, the will must be established.

3d. That the objection, that the doctrine of executory devises was not applicable to a trust of accumulation, was totally unfounded; the attention of a court of equity had been frequently directed to a trust of accumulation. There were many cases, in which accumulation had been directed by the court, because the testator had directed it expressly; others, in which it had been directed, because the will contained indications of such an intention; and others, in which the attention of the court had been so particularly called to the legality of the accumulation directed, as to fix the period, beyond which such accumulation was not to extend; the objection had never been before made, even in argument, except in the case of *Lady Dennyson's* will, when it was raised in argument, but without

Hopkins v. Hopkins,
Tailb. Rep.
44.

Gibson v. Rogers,
1 Ves. 485.

Harrison v. Harrison,
21st July
1786.

success. That it had always been considered as in the power of a testator to direct an accumulation of the rents and profits of his estates for the same period of time, during which the law allows a testator to render his estate unalienable. If that was not the period, during which the trust of accumulation was to continue, what other period was to be substituted? Might the accumulation be permitted for one life, or for three lives, or for twenty? Different judges might entertain very different opinions upon the subject: one good life might be more than equal to fifty bad lives. The rule, therefore, which could be neither extended nor contracted, was laid down by the law; and was, that accumulation might go on during that period of time, during which the law permitted the estate to remain unalienable: the law did not regard the quantity of property accumulated, but anxiously provided that, when accumulated, it should not remain unalienable beyond a period clearly marked out and ascertained.

4th. With respect to the objection, that a child *in ventre sa mere* was not a life in being for the purpose of suspending the absolute vesting of an estate, it was clear that such children were considered by the law as in being for a variety of purposes. They were considered as in being at the death of an intestate, in order to be entitled to take under the statute for distribution of an intestate's estates; they were capable of taking by descent estates in fee-simple, or in fee-tail. It was admitted, that they were to be considered as in being for all purposes, and in all cases, for their own benefit; but it was said, that they were not considered as in being

being for such a purpose as the present; the whole foundation for the argument, that such children were to be considered as in being for their own benefit only, rested upon some words which some reporters of decisions have ascribed to judges, when delivering their opinions upon claims made by such children: but these words, if they were used in those cases, by no means negative the proposition, that such children were in being for all purposes; there was no reason for confining the rule: they were entitled to all the privileges of other persons, and it was reasonable they should be the means of conferring privileges upon other persons; but the law considered such children as in being, in cases in which they might be prejudiced; they might be vouched in a recovery, though such voucher was for the purpose of making them answerable over in value; they might be executors. Such a child had been considered in being for such a purpose as the present, in *Long v. Blackall*, which was a complete decision on the very point. Supposing that the case of *Long v. Blackall* had not settled the point, the words in the testator's will, "born in due time afterwards," afforded a principle of construction sufficient to maintain the point. Those words must mean, in construction of law, as describing that period during which persons might come *in esse*, for whose lives, according to the law, the accumulation might go forward.

5th. With respect to the objection, that the words of restriction in the will, "as shall be living at the time of my decease, or born in due time afterwards," were, according to just construction, to be confined to

the last class of persons, during whose lives the accumulation was to be ; and could not, according to the rules of construction, be carried back to any of the preceding classes. It was submitted, that the clause of restriction could not be disconnected from all the descriptions of persons whose lives were specified. It was one sentence, and the qualification was applicable, and must be applied to the whole : strict grammatical construction was not the rule, which governed in wills, if the intention of the testator required a different construction : and this sort of construction applied to all cases, whether the testamentary disposition were contrary to, or consistent with, what might be considered as worthy of favour, that the intention of the testator, if it were not inconsistent with the rules of law, was alone to be attended to. That it was impossible to read the clause in question, with a view to discover the real meaning of the testator, without being convinced that the testator meant to apply the restrictive words to all the members of the clause, that should require such restriction ; the adding of the restriction, after the enumeration of the last class of persons, was not, because it was intended to apply to that only, but in order to avoid the frequent repetition of it.

6th. As to the objection, that the testator had exceeded the bounds prescribed by law for the suspense of property, in the clause by which he directed the property to be invested in the funds, until such purchases could be found, if such objection was now to be repeated, the answer was, that such was the case in every will, where there was a direction to lay out the
 accumu-

accumulating fund of principal and interest in lands. It was always in this way, that, until the purchase could be made, the money was to be accumulated, where an accumulating fund was to be made the ground of purchase, the interest and dividends, until the purchase was made, were never directed to be paid to the person who would be entitled to the rents and profits of the lands to be purchased.

The following questions were put to the Judges :—

1st. A testator, by his will, being seised in fee of the real estate therein mentioned, made the following devise: “ I give and devise all my manors, messuages, “ tenements, and hereditaments, at *Brodsworth*, in the “ county of *York*, after the death of my sons *Peter* “ *Isaac Thelluffon*, *George Woodford Thelluffon*, and “ *Charles Thelluffon*, and of my grandson *John Thelluffon*, son of my said son *Peter Isaac Thelluffon*, and “ of such other sons as my said son *Peter Isaac Thelluffon* now has or may have, and of such issue as “ my said grandson *John Thelluffon* may have, and of “ such issue as any other sons of my said son *Peter* “ *Isaac Thelluffon* may have, and of such sons as my “ said sons *George Woodford Thelluffon* and *Charles* “ *Thelluffon* may have, as shall be living at the time “ of my decease, or born in due time afterwards ; and “ after the deaths of the survivors and survivor of the “ several persons aforesaid, to such person as, at the “ time of the death of the survivor of the said several “ persons, shall then be the eldest male lineal descendant of my son *Peter Isaac Thelluffon*, and his heirs

“ for ever.” At the time of the testator’s death, there were seven persons actually born, answering the description mentioned in the testator’s will: and there were two *in ventre sa mere*, answering the description, if children *in ventre sa mere* do answer that description. All the said several persons, so described in the testator’s will, being dead; and, at the death of the survivor of such several persons, there being living one male lineal descendant of the testator’s son *Peter Isaac Thelluffon*, and one only: Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words in which the same is expressed, to the said manors, messuages, tenements, and hereditaments at *Brodsworth*?

2d. If, at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *in ventre sa mere*, would such lineal descendant, when actually born, be so entitled?

The Lord Chief Baron of the Court of Exchequer delivered their unanimous opinion upon the said questions in the affirmative.

The following is a note of his Lordship’s speech on that occasion.

The first objection to the will is, that the testator has exceeded that portion of time within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law,

for

for three reasons. First, Because that so great a number of lives cannot be taken, as in the present instance, to protract the time during which the vesting is suspended; and, consequently, the power of alienation suspended. Secondly, That the testator has added to the lives of persons who should be born at the time of his death, the lives of persons who might not. Thirdly, That, after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, “as shall be living at my decease, or born in due time afterwards:” that, as these words appertain only to the last class in the enumeration, the words which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and so make this executory devise void in its creation, as being too remote. With respect to the first ground, *viz.* the number of lives taken, which, in the present instance, is nine, I apprehend, that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases in which this subject has been considered, by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumspection, but have treated the number of existing lives as a matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation, during any one life; and that, in fact, the life of the survivor of many persons named or described is but the life of some one. This was held, without dissent, by

Twisden in Love v. Wyndham, 1 Mod. 50., 20 years before the determination of the Duke of *Norfolk's* case, who says, that the devise of a term may be for 20 lives, one after another, if all be in existence at once. By this expression, he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord *Nottingham*, as to the time within which the contingency must happen, he thus expresses himself: “ If a term be devised, or the trust of a term limited, “ to one for life, with 20 remainders for life successively, and all the persons are in existence and alive “ at the time of the limitation of their estates, these, “ though they look like a possibility upon a possibility, “ are all good, because they produce no inconvenience: they wear out in a little time.” With an easy interpretation, we find, from Lord *Nottingham*, what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations, that is, beyond the time at which one remainder-man would attain his age of 21, if he were not born when the limitations were executed; when he declares, that he will stop where he finds an inconvenience, he cannot, consistently with a second construction of the context, be understood to mean, where judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated where inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done

by

by legal limitations. I understood him to mean that, wherever courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented : and he gives the same, but no greater latitude, to executory devises and executory trust, as to estates tail. This has been ever since adopted ; in *Scatterwood v. Edge*, 1 *Salk.* 229., the court held that an executory estate, to arise within the compass of a reasonable time, is good ; as 20 or 30 years, so is the compass of a life or lives : for, let the lives be never so many, there must be a survivor, and so it is but the length of that life. In *Humberston v. Humberston*, 1 *P. Wms.* 332., where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence ; Lord *Cowper* restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those who were living (at the death of the testator), and estates tail to those who were unborn ; considering all the co-existing lives, (a vast many in number), as amounting in the end to no more than one life. His Lordship was in the situation, attended to by Lord *Nottingham*, where a visible inconvenience appeared. The bounds, prescribed to limitations in common law conveyances, were exceeded : the excess was cut off ; and the devise confirmed within those limits. Lord *Hardwicke* repeats the same doctrine in *Sheffield v. Lord Orrery*, 3 *Aik.* 282. ; using the words “ life ” or “ lives,” without any restriction as to number. Many other cases might be cited to the like effect : but I shall only add what is laid down in two very modern cases. In *Gurnall v. Wood*, Lord Chief Justice *Willes* speaks
of

of a life or lives, without any qualification : and Lord *Thurlow*, in *Robinson v. Hardcastle*, says, that a man may appoint 100 or 1000 trustees ; and that the survivor of them shall appoint a life estate. It appears, then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or whose other very extensive descriptions are made use of ? It may be answered, that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite impracticable, to ascertain the extinction of the lives described ; and will be supported or avoided accordingly.

But it is contended, that, in these, and other cases, the persons during whose lives the suspension was to continue, were persons immediately connected with, or immediately leading to, the person in whom the property was first to vest, when the suspension should be at an end. I am unable to find any authority for considering this as a *sine qua non*, in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged, up to a certain extent, for the convenience of families ; which, in almost all instances, look to the existing members of the family of the testator, and its connections. But when the true reason for circumscribing the period, during which
alienation

alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is, the avoiding of a public loss, by placing property for too great a length of time out of commerce. The length of time will not be the greater or less, whether the lives taken have any interest vested or contingent, or have not; nor whether the lives are those of persons immediately connected with, or immediately leading to, that person in whom the property is first to vest; terms, to which it is difficult to annex any precise meaning. The policy of the law can no way be affected by those circumstances; which, I apprehend, look merely to duration of time. This could not be the opinion of Lord *Thurlow* in *Robinson v. Hardcastle*; nor is any such opinion to be found in any case, or book, upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice *Willes*, with his usual accuracy and perspicuity: “ Executory devises
“ have not been considered as mere possibilities, but
“ as certain interests and estates, and have been re-
“ sembled to contingent remainders in all other re-
“ spects, only they have been put under some restraints,
“ to prevent perpetuities. As at first it was held, that
“ the contingency must happen within the compass of
“ a life or lives in being, or a reasonable number of
“ years, at length it was extended a little farther,
“ namely, to a child *in ventre sa mere*, at the time of
“ the father’s death; because, as that contingency must
“ necessarily happen within less than nine months after
“ the death of a person in being, that construction
“ would introduce no inconvenience: and the rule
“ has,

Rep. 215.

“ has, in many instances, been extended to 21 years
 “ after the death of a person in being; as, in that
 “ case likewise, there is no danger of a perpetuity.”
 Comparing what the testator has done in the present
 case with what is above cited, it will appear, that he
 has not postponed the vesting even so long as he might
 have done.

The second objection which has been made in
 this case is, that the testator has added to the
 lives of persons, in being at the time of his decease,
 those of persons not then born. It becomes, there-
 fore, necessary to discover, in what sense the testator
 meant to use the words “ born in due time after-
 “ wards.” Such words, in the case of a man’s own
 children, mean the time of gestation: what is to be
 intended by these words in this will, must be collected
 from the will itself. It may be collected from the will
 itself, that by those words, the testator meant to de-
 scribe the period of time, within which issue might be
 born, during whose lives the trust might legally con-
 tinue; or, in other words, whom the law would
 consider as born at the time of his decease. Now,
 these could only be such children of the several per-
 sons named, as their respective mother’s were *ensient*
 with, at the time of his death. Or he may have meant
 to use the word “ *born*,” as denoting that period of time,
 which would be the necessary period for effecting his pur-
 pose. This is probable, from his using the same words as
 applied to the time, during which the presentation to
 the advowson of *Mar* might be suspended, without
 incurring a lapse. That a child *in ventre sa mere* was
 considered in existence, so as to be capable of taking

by executory devise, was maintained by *Powell* in the case of *Loddington v. Kyme* (1 *Ld. Ray.* 203.) upon the ground, that the space of time between the death of the father, and the birth of the posthumous son, was so short, that no inconvenience could ensue. So, in *Northey v. Strange*, 1 *P. Wms.* 340., Sir *John Trevor* held that, by a devise to children and grandchildren, an unborn grandchild should take. Two years after, Lord *Macclesfield*, in *Burdett v. Hopegood*, 1 *P. Wms.* 486., held that, where the devise was to a cousin, if the testator should leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In *Wallis v. Hodgson*, 2 *Atk.* 117., Lord *Hardwicke* held, that a posthumous child was entitled under the statute of distribution; and his reason deserves notice. "The principal reason," (says he), "that I go upon, is, that the plaintiff was *in ventre sa mere* at the time of her brother's death, and, consequently, a person *in rerum natura*; so that, by the rules of the common and civil law, she was to all intents and purposes a child, as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living; *Beale v. Doe*, 1 *P. Wms.* 244.; and so in a variety of other reports. In *Bassett v. Bassett*, Lord *Hardwicke* decreed rents and profits, which had accrued at the rent day preceding his birth, to a posthumous child: and, since the statute 10 and 11 *Wm.* 3., such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Doe v.*

Quartley,

Quartley, 1 T. R. 634., the devise was to *Hester Read* for life, daughter of *Walter Read*, and to the heirs of her body, and, for default of such issue, to such child as the wife of *Walter Read* is now *ensient* with, and the heirs of the body of such child; then to the right heirs of *Walter Read* and *Mary* his wife. It was contended, that the last limitation was too remote, as coming after a devise to one not in being, and his issue. But the court said, that, since the statute of King *William*, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver v. Wickett*, 1 Wilf. 105., the devise was to the wife for life, then to the child with which she was supposed to be *ensient*, in fee, provided that, if such child should die before 21, leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child *in ventre sa mere*, being *in futuro*, would have been a good executory devise. In *Lancashire v. Doe*, 5 Term R. 49., the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe v. Clarke*, Lord Chief Justice *Eyre* holds that, independently of intention, an infant *in ventre sa mere*, by the course and order of nature, is then living, and comes clearly within the description of children living at the parent's decease: and he professes not to accede to the distinction between the cases, in which a provision has been made for.

for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to have been actually born at the time of his death. The most recent case is that of *Long v. Barkland*; the Court of B. R. had no doubt that a devise to a child *in ventre sa mere*, in the first instance, was good; and a limitation over was good also, on the contingency of there being no issue male, or descendant of issue male, living at the death of such posthumous child. It seems then, that, if estates for life had been given to the several *cestuis que vie* in this will, and, after their deaths, to their children, either born or *in ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity, then, can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch, as the circulation of real property is no more fettered in the one case, than in the other. It is, however, observable, that this question may never arise, if it shall so happen that the children, *in ventre matris* at the death of the testator, shall not survive those who were then born.

The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons, during whose lives the restriction is suspended. This objection, (I conceive,) will be removed, by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with

with the rules of law, that shall prevail. His intention evidently was, to prevent alienation, as long as by law he could : if, then, it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions, and that the testator intended to leave the four descriptions of persons, which immediately preceded this seventh class, without the benefit of such restriction, although they stand in need of it, we must do violence to all established rules on this head. That construction is to be adopted, which will support the general intent. The grammatical rule, of referring qualifying words to the last of the antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent, which is disclosed in the context ; namely, that they should be applicable to such classes as require them ; and, as to the others, to consider them as surplusage : if words will admit of more constructions than one, that which will support the legal intention of the testator, is, in all cases, to be adopted.

I do not trouble your Lordships with any observation upon the objections, arising from the magnitude of the property in question, either as it now stands or may hereafter stand ; or as to the motives which may have influenced this testator, nor his neglect of those considerations, by which I, or any other individual, may or ought to have been moved : that would be to suppose, that such topics can in any way affect the judicious mind. For these imperfect reasons,

I concur

I concur with the rest of the Judges in offering this answer to your Lordship's first question.

As to the second question, the objection to such child being entitled, must arise from an allowance having been made for the time of gestation, at the end of the executory trusts: it seems to be settled, that an estate may be limited in the first instance to a child unborn; and, I apprehend, to the first and other sons in fee, as purchasers. The case of *Long v. Blackball* seems to have decided, that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, is a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then, this time has been allowed, in some cases at the beginning, and in others, at the termination of the suspension; and, if such children are considered, by the construction of the statute 10 and 11 *Wil. 3.*, as being born to such purposes, what should prevent the period of gestation from being allowed, both at the commencement and at the termination of the suspension, if called for? In those cases where it has been allowed at the commencement, and particularly in *Long v. Blackball*, it must have been obvious to the court, that it might be wanting at the termination: yet that was never made an objection. In *Gulliver v. Wickett*, the child, which was supposed to be *in ventre sa mere*, might have married and died before 21, and left his wife enſient: in that case, a double allowance would have been required; yet that possibility was never made an objection, although it was obvious. In *Long v. Black-*
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ball, according to the printed report, the precise point was not gone into. But it is plain, that the attention of the court must have been drawn to it: for the learned Judge, who argued that case in support of the devise, expressly stated, “ that every common case of
 “ a limitation over, after a devise for a life in being,
 “ with remainder in trust to his unborn issue, includes
 “ the same contingency as was then in question: for
 “ the heir for life may die, leaving his wife enſient;
 “ and the only difference is, that the period of geſta-
 “ tion occurs at the beginning, instead of the end, of
 “ the first legal eſtate.” It must have been palpable, that it might possibly occur at both ends. Every reason, then, for allowing the period of geſtation in the one case, seems to apply with equal force to the other, and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But, natural justice having, in several cases, considered children *in ventre matris* as living at the death of the father, it should seem that no distinction can properly be made; but that, in the singular event of both periods being required, they should be allowed, as there can be no tendency to a perpetuity.

After the opinion of the Judges had been delivered, the Lord Chancellor addressed the House as follows.

The learned Judges having given their opinion upon the points of law referred to them, there is nothing remaining for the consideration of the House, except one question, which could not be referred to the Judges. This cause was decided in the Court of
 Chancery

Chancery by Lord *Roslyn*, with the assistance of Lord *Alvanley*, Mr. Justice *Buller*, and Mr. Justice *Lawrence*, and, I believe, that I speak in the hearing of those who know, that the late Lord *Kenyon* could hardly be brought to consider these questions as fit to be argued, thinking it dangerous, after what had been settled with respect to executory devises, to allow so much consideration to be given to them. His opinion upon the subject was never doubted. In the case of *Robinson v. Hardcastle*, it is laid down as unquestionably competent to a testator to give the power of appointing a life estate to the survivor of a thousand persons, to begin at the decease of such survivor. Your Lordships, therefore, have the concurrent testimony of all the learned persons to whom I have alluded, as well as of the learned Judges, whose unanimous opinion has been delivered this day, upon this great case. Not great indeed on account of the questions which it involves, or of any thing of which, as judges, we can take notice, since the decision must be the same, whether the property in question be one hundred pounds, or seven hundred thousand pounds *per annum*. If it were allowable to entertain a wish upon the subject, perhaps we might all concur; but we are only to consider, whether there be any thing in this will to render it illegal. When it was said that an attempt to tie up property for nine lives, was illegal, I thought that such a proposition could not be supported; for the length of time does not depend upon the number, but on the nature of the lives; if we are to argue on probabilities, two lives may last longer than nine or ten. If, in the year 1796, estates had been devised to accumu-

late during the lives of so many of the members of this house as have died since that time, it might have been argued, that the property was tied up for 20 or 30 lives : and yet this number of lives has worn out in a very short period. The question, therefore, cannot turn upon the magnitude of the property, or the number of the lives. The question is, whether there be any rule of law which prescribes a period for which property may be unalienable ? Now, the language of all the cases is this, that property may be so limited as to make it unalienable during any number of lives. I know no other rule but that. Such being the law, there is another question arising upon this will, which is a pure question of equity, whether a testator can direct the rents and profits to be accumulated during that period for which he may so make the property unalienable ? That he may do so, I take to be most clear. In truth, I speak in the hearing of those who will assent to me, when I say, that if the testator had given the residue of his personal estate to such person as should be the eldest male descendant of *Peter Isaac Thellusson* at the death of the survivor of all the lives, without more, that simple bequest would direct an accumulation, until it should be seen what person answered the description of that male descendant ; and the effect of the common rules of law would have supplied the rest. The course of proceeding would have been, to enquire, whether the executory devise of the personal estate to such future individual were good ; and, if it were good, then, wherever the residue was given, the interests and profits would go likewise. There can be no more objection to such person

person taking the interest, than the capital itself. Suppose the nine persons during whose lives this property is tied up had been lunatics, the interest and profits would be accumulated without any direction; nor does the policy of the law, which respects perpetuities, apply to the case of accumulation: the rents and profits are not locked up, but are constantly invested, and the fund is kept in a course of constant circulation. If, then, the fruits of the property are kept in constant circulation, while the property is limited, what objection can there be to accumulation? I remember, in the case of *Mrs. Buckley's* will, where the testatrix had given property to such son of her infant daughter as should first attain the age of 21, Lord *Kenyon*, then Master of the Rolls, directed the whole profits to accumulate during that period, taking the rule to be quite clear, that, so long as the property was unalienable, he might direct the rents and profits to accumulate. And I speak with great sincerity, when I say, that I never could entertain the least doubt upon the subject. If we lay aside all the cases which have occurred since the act of 40 and 41 *Geo.* 3., there is nothing to impeach it. That act was rather a matter of surprise upon me, and, perhaps, it is not one of the wisest legislative measures: it must be remembered, that it expressly alters what it takes to have been the former law, and confines the power of accumulation to 21 years. But if your Lordships were to exercise the power of accumulation in all the cases allowed by the act, the accumulation would be enormous. It did not occur to those who penned the act of 40 and 41 *Geo.* 3., that if this very will had been made subsequent

Infra f. 57.

Griffiths v.
Vere, *infra*
f. 59.

to the passing of that act, the accumulation directed by the will would have gone on for 21 years. The Court of Chancery has decided, that if a person makes such a disposition of his property that it may be unalienable for a longer period than is allowed by the act, such disposition is only void for so much as exceeds the term of 21 years, leaving it good for the rest of the term. The only points which have ever appeared to me to bear an argument, have been those, upon the critical meaning of the words, “as shall be living at the time of my decease;” and the words, “or born in due time afterwards,” which follow the description of the persons during whose lives the property is tied up. If from any disinclination to give effect to the will, your Lordships were to construe the former words as referring to the last description of persons only, that disinclination would be gratified at the expence of overturning all the rules of construction which have been settled for ages: and, even if your Lordships should feel inclined to give any relief by legislative interference, which would be very bold, I am quite sure that you will not be so bold as to give a wrong judgment in point of law, that if a person makes such a disposition of his property, that it may be unalienable for a longer period than is allowed by the act, such disposition is only void for so much as exceeds the term of 21 years, leaving it good for the rest of the term. With respect to the other point, *viz.* “born in due time afterwards,” I observe that, according to the printed report, one of the Judges held, that these words must refer to a child *in ventre sa mere*; and the others, that they amounted to a declaration

claration of the testator's will, that the property should be unalienable and accumulate during the lives of all the persons, born or unborn, whom the law authorized him to take as lives. In my opinion, either of these constructions may be taken to be the true meaning, agreeably to the rules of law; but I must add, that, according to the rules of law, the house must put such a construction upon the words, as will support the testator's intention; it is, therefore, quite beside the question, to argue what child should take, because the testator is describing the lives of persons, in order to define the period of time during which the power of alienation is to be suspended, and the accumulation is to go on. But, if it were necessary, I should have no difficulty, as a lawyer, in stating to the house, that I think the rule of law has been rightly laid down, that the period of gestation is to be taken at the beginning and the end. In *Gulliver v. Wicket*, the devise was to a child of whom the mother was *ensient*, with a proviso, that the property should go over, if that child should die under 21 without issue; and in the construction of that devise, it was laid down, that the devise extended to the child *in ventre sa mere*; and that, if the child to whom it was given had attained 20 years of age, and married, and died leaving his wife *ensient*, it could not be said that the property was not vested. In the case of *Long v. Blackall*, I thought it my duty as counsel, to submit to the consideration of the Chancellor, such points as occurred to me in support of the interest of my client, and urged, that the allowance for the time of gestation was made at both ends. I thought that the point was not

treated with the respect that it deserved. The Chancellor sent the case to the Court of King's Bench, but the point was not made ; and when I pressed the Chancellor to send it there again, his answer was, that he was very much ashamed of ever having sent it there ; and that he would not send it again. I know that Lord *Kenyon's* opinion was quite clear upon the subject, as well as those of Mr. Justice *Buller*, and Mr. Justice *Lawrence*. This, therefore, is a case, in which the legal doctrine is clear ; and, whatever may be our regret upon the subject, is it not our duty to determine according to law ? When I put the question, whether this decree shall be reversed, I shall think myself bound to say, that I think it ought to be affirmed.

The decree was affirmed.

§ 57. By the statute 39 and 40 *Geo. 3. c. 98.*, it is enacted, “ That no person or persons shall, after the
 “ passing of that act, by any deed or deeds, surren-
 “ der or surrenders, will, codicil, or otherwise how-
 “ soever, settle or dispose of any real or personal
 “ property, so and in such manner that the rents,
 “ issues, profits, or produce thereof, shall be wholly
 “ or partially accumulated, for any longer term than
 “ for the life or lives of any such grantor or grantors,
 “ settler or settlers, or the term of 21 years from the
 “ death of any such grantor, settlor, deviser, or testa-
 “ tor, or during the minority or respective minorities
 “ of any person or persons who shall be living or in
 “ *ventre sa mere*, at the time of the death of such
 “ grantor, deviser, or testator, or during the minority
 “ or

“ or respective minorities only of any person or persons, who, under the uses or trusts of the deed, furrender, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

“ Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if the act had not passed.”

§ 58. Although a trust of accumulation created by will during the continuance of a life, is void under this statute, yet such trust will be supported by the

Court

Court of Chancery, during the time allowed by the act, namely, 21 years.

Griffiths v.
Vere, 9 Ves.
Jun. 127.

§ 59. *Charlotte Mathews* devised all her real estates to trustees, upon trust to sell, and gave all her personal estate to the said trustees, upon trust to invest the monies to arise from the sale of her real estates, and her personal estate, in the public funds, upon trust to pay the dividends to her sisters *Elizabeth Mary Griffiths* and *Martha Vere*, during their joint lives in equal proportions; and after the decease of either of them, the whole to the survivor during her life. Provided, and she declared her will, that so much of the said dividends as should accrue due to *Elizabeth Mary Griffiths* during the life of *John Griffiths* her husband, should not during that time be paid to her, but the same should be, during his life, invested by the trustees in the public funds, and that the dividends or interest which should accrue thereon, should be added to and accumulate with the capital; and upon the decease of the said *John Griffiths*, the said capital, with the accumulation thereof, should be forthwith paid to *Elizabeth Mary Griffiths*.

Under a bill by Mrs. *Griffiths* and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented by Mr. and Mrs. *Griffiths*, praying a declaration, that the proviso directing accumulation was contrary to the statute 39 and 40 Geo. 3. c. 98., and, therefore, null and void: and that the petitioners were entitled to have

have full benefit of the will, as if such clause had not been inserted.

A petition for the same purpose had been presented to the Master of the Rolls, and dismissed.

In support of the petition, it was argued, that the meaning of the act was, that the whole attempt against which it was directed, should be void: it could not, therefore, be good for a given time, the Legislature having intimated nothing to that effect. A direction to accumulate for a life, was a direction to accumulate for more than 21 years, a life estate being larger than an estate for years. The value of the life was of no importance, and the court would not inquire into that. This act was to be construed by analogy to the law of executory devises, which were allowed only within certain limits. As the accumulation might, by possibility, last longer than 21 years, the disposition was void, as a limitation over of personal property, after a disposition to a man and the heirs of his body, was void, without regard to the possible event that they might be extinct within the period allowed by law. If the accumulation should, under the direction in the will, continue beyond the 21 years, what was to become of that, which was accumulated after that period; and of the interest of the previous accumulation?

Against the petition, it was contended, that this case arose upon a statute restraining the legal right to dispose

dispose of property. Upon the construction of the act, it clearly was not intended to prevent accumulation in any case after the death of the party, to the period of 21 years; and though an attempt was made to go beyond that, the purpose should be good to that extent, in whatever form it was directed; for no precise form of directing accumulation was prescribed, nor could that be intended; but it was sufficient, whatever the form, that it was not to exceed the period of 21 years. The direction that, so far as accumulation was directed contrary to the act, it should be void, applied only to the excess. There would be certainly some difficulty, in the event of the parties living beyond the period of 21 years, to determine what should become of the excess. But, if *Mrs. Griffiths* survived that period, she would be entitled to the accumulation, provided she survived her husband, to whose death it was confined; and it was possible, that he might live only two or three years.

Lord *Eldon* said, the question turned on the will and the act of parliament. He understood a petition to the same effect was presented to the Master of the Rolls, insisting that, by the will, accumulation was prescribed beyond what was allowed by the act, and, therefore, the direction was wholly void; and that then *Mrs. Griffith's* husband was, within the terms of the act, entitled to the rents and profits, as if no such clause for accumulation was in the will. And the Master of the Rolls was of opinion, that, upon the true construction of the act, the accumulation directed during

during the life of the husband, if not in fact going beyond 21 years, was good; and if it did in fact continue beyond that period, yet, upon the true construction of the act, the direction was good *pro tanto*; and during the period of 21 years, the rents and profits were well directed to accumulate, leaving it to the law to determine what was to become of the rents and profits to accrue between the end of the 21 years, and the expiration of the life; and, of course, to determine also what was to become of the interest of the fund created by the accumulation permitted for the period of 21 years.

The sort of case now before him was not, he believed, much in the contemplation of the Legislature. It was material to attend to every word of the act, for the language was not very similar to any other act, with either enabling or restraining clauses. The phrase, "partial accumulation," was rather expressive of the effect than of direction; but, considering the subsequent part, it must be construed what should be directed to be accumulated. If the act stopped at the declaration, that it should be null and void, the estate, in the meantime, would be considered as not given, unless falling into the residuary devise; and, therefore, the rents and profits undisposed of, must have gone to the heir. But the question was, whether the following words were not so explanatory of the former, as to shew in what sense the Legislature used the words declaring that it should be null and void; and whether, taking the whole clause together, it was not

meant, only as far as by the subsequent words it was directed to be so considered? The words, "so long," admitted two constructions; one, so long as the same, by the effect of the direction in the will, should be capable of being accumulated beyond 21 years from the death; the other, so long as the same should be directed to be accumulated contrary to the provisions of the act: the accumulation being understood to be contrary to the act, if directed by the will for more than 21 years. It was obvious, that many cases upon the old law of executory devise and accumulation, were not in any manner provided for by this act. He doubted whether the present case was thought of, for, by this will, the estate was given, not by executoy devise, but by creating a trust to pay the annual profits, and then followed the direction for accumulation. If that direction was struck out, it was contended that the effect was not, as in other cases, that those profits would be undisposed of, but that it must be considered a gift *in presenti*; and that the clause for accumulation did not prejudice their immediately entering into the enjoyment. If it was necessary to decide that question, a good deal was to be said upon it; and it was not clear upon this will, that it could necessarily be made out that there was a gift *in presenti*, if this direction was struck out of the will, for the whole must be taken together. But, supposing it not struck out, was the direction void altogether, because it was not a direction for accumulation during 21 years or less, but which might happen to operate during a period, that might last longer, admitting also that it might

might operate as a direction for less in effect? The point was doubtful, but, upon the whole, that construction which had been put upon the act was the right one; and he was the rather led to that, by the concurrence of opinion among those to whose assistance he had resorted upon the first construction of an act of so much importance, who all agreed, that this was the proper construction. Under these circumstances, finding the Master of the Roll's opinion to be such as he had stated; and that it had the concurrence of those whom he had consulted, it would be enough for him, if it was only the inclination of his opinion, to say this was the right construction.

The petition was dismissed.

END OF SIXTH AND LAST VOLUME.

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